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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 679.

CHARLES CARLESI *ALIAS* CHARLES CARLESE, PLAINTIFF IN ERROR,

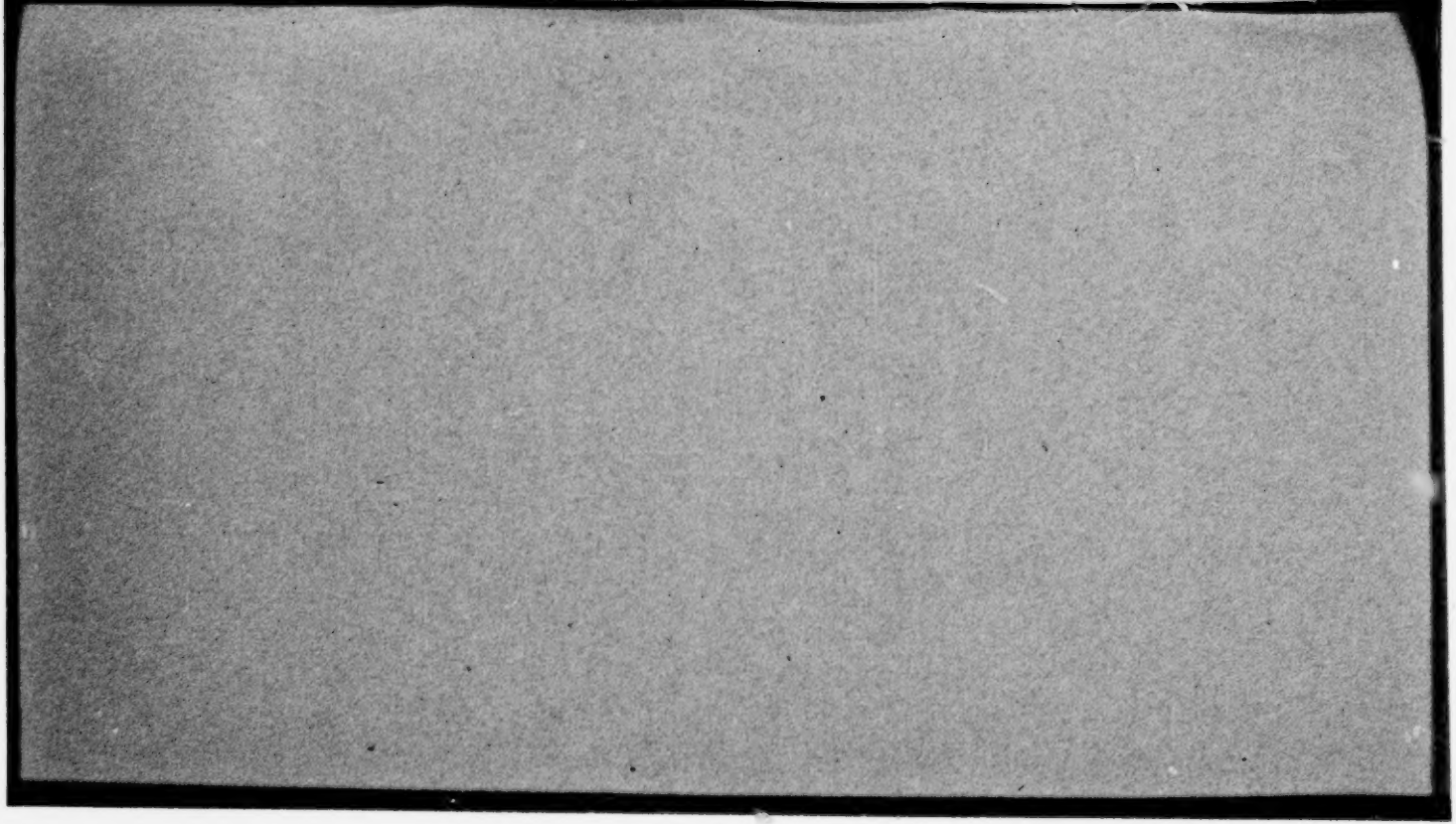
vs.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF GENERAL SESSIONS OF THE PEACE IN AND FOR THE COUNTY OF NEW YORK, STATE OF NEW YORK.

FILED AUGUST 9, 1913.

(23,830)



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a Court of Appeals of the State of New York.

PEOPLE OF THE STATE OF NEW YORK, Respondent,
v.
CHARLES CARLESI, alias CHARLES CARLESE, Defendant-Appellant.

Case on Appeal.

Brande & Weber, Attorneys for Defendant-Appellant, 346 Broadway, Borough of Manhattan, New York City.
Charles S. Whitman, District Attorney of New York County, Attorney for Respondent.

1 Court of General Sessions of the Peace in and for the County of New York.

PEOPLE OF THE STATE OF NEW YORK, Respondent,
vs.
CHARLES CARLESI, alias CHARLES CARLESE, Defendant-Appellant.

Statement under Rule 41.

This is an appeal by the defendant from a judgment of conviction rendered against him in the Court of General Sessions of the Peace, in and for the County of New York, on the 9th day of February, 1912, which judgment convicted the defendant of the crime of forgery in the second degree as a second offence.
Messrs. Brande & Weber were the attorneys for the defendant on the trial of this action, and are the attorneys for the defendant on this appeal.

2 *Notice of Appeal.*

Court of General Sessions of the Peace in and for the County of New York.

PEOPLE OF THE STATE OF NEW YORK, Respondent,
vs.
CHARLES CARLESI, alias CHARLES CARLESE, Defendant-Appelant.

SIR: Please take notice, that the above-named defendant hereby appeals to the Appellate Division of the Supreme Court, First Department, from the judgment of conviction rendered against him in the Court of General Sessions of the Peace, New York County, for the crime of forgery in the second degree, as a second offence, on the

23rd day of February, 1912, and the defendant appeals from each and every part of said judgment.

Dated, New York, February 28, 1912.

Yours, &c.,

BRANDE & WEBER,
Attorneys for Defendant-Appellant.

Office and Post Office Address, No. 346 Broadway, New York City.

To Hon. Charles S. Whitman, District Attorney, N. Y. Co.; Edward R. Carroll, Esq., Clerk of Court of General Sessions.

3 *Transcript of Clerk's Minutes.*

At a Court of General Sessions of the Peace of the City and County of New York, Holden in and for the County of New York, at the Building for Criminal Courts in the Borough of Manhattan of the said City, on Friday, the 26th Day of January, the Year of Our Lord One Thousand Nine Hundred and Twelve.

Present: The Honorable Otto A. Rosalsky, Judge of said Court of the County of New York, Justice.

Charles Carlesi, alias Charles Carlese, is in due form of law arraigned at the bar upon an indictment for forgery in the second degree as a second offense, and having heard the indictment read and being asked whether he demanded a trial thereon, answers that he does require a trial, and says that he is not guilty thereof;

Whereupon, the following jury is balloted and sworn to well and truly try and a true verdict give according to evidence, viz:

Charles F. Bosh, Charles F. Pape, Isidore Isaacs, Frederick W. Coffin, Henry J. Tillman, Howard Tillotson, Milton Marshall, John B. Corcoran, Henry Southgate, Lewis R. Schenck, John W. Anderson, Levy Jacobs, who upon their oath aforesaid do say that the said Charles Carlesi alias Charles Carlese, is guilty of the crime of forgery in the second degree as a second offense, by the indictment *is* alleged against him.

4 *Transcript of Clerk's Minutes.*

FRIDAY, *February* 23, 1912.

Court meets.

Present as before.

Counsel for defendant (Mr. Levy) moved for a new trial and in arrest of judgment on various grounds, which motions after due deliberation are severally in all things denied by the Court.

The defendant is arraigned at the bar.

The District Attorney moves for judgment against the defendant.

It is thereupon demanded of the said Charles Carlesi alias Charles Carlese, what he hath to say why judgment should not be pronounced against him according to law, who nothing further saith unless as before he hath said.

Whereupon, it is considered, ordered and adjudged by the Court, that the said Charles Carlesi alias Charles Carlese for the felony aforesaid whereof he is convicted as aforesaid, be imprisoned in the State Prison at hard labor for the term of twelve years and eleven months.

A true extract from the minutes.

EDWARD R. CARROLL,
Clerk of Court.

5 *Indictment.*

Court of General Sessions of the Peace in and for the County of New York.

THE PEOPLE OF THE STATE OF NEW YORK
against
CHARLES CARLESI, Otherwise Called CHARLES CARLESE.

The Grand Jury of the County of New York, by this indictment accuse Charles Carlesi, otherwise called Charles Carlese, of the crime of forgery in the second degree, as a second offence, committed as follows:

Heretofore, to wit, at a Circuit Court of the United States of America, for the Southern District of New York in the Second Circuit, held at the Federal Building, in the Borough of Manhattan, of the City of New York, in the County of New York aforesaid, on the 20th day of December in the year of our Lord one thousand eight hundred and ninety-five, before the Honorable Addison Brown, then Judge of the said Court, the said Charles Carlesi, otherwise called Charles Carlese, by the name and description of Charles Carlese, was in due form of law convicted of a crime, to wit, selling and having in possession counterfeit silver dollars upon a certain indictment then and there in the said Court depending against him, the said Charles Carlesi, otherwise called Charles Carlese, by the name and description of Charles Carlese, as aforesaid, against one Sal-
6 vatore Macchione, alias Lombardi, against one Angelo Pastore, against one Joseph Carlese, against one Joseph Vastelli and against one Santo Lazaro;

For that they, the said Salvatore Macchione, alias Lombardi, Angelo Pastore, Joseph Carlese, Charles Carlese, Joseph Castelli and Santo Lazaro, then late of the City and County of New York, in the District and Circuit aforesoid, yeomen heretofore, to wit, on the 3rd day of October in the year of our Lord one thousand eight hundred and ninety-five, at the Southern District of New York, and within the jurisdiction of the Court last aforesaid, did unlawfully and feloniously, and with intent to defraud some person unknown, sell, utter and publish a certain falsely made, forged and counterfeited coin in resemblance and similitude of the silver coin of the United States, called and known as the standard silver dollar, which had theretofore been coined at the mints of the said United States, they, the said Salvatore Macchione, alias Lombardi, Angelo Pastore,

Joseph Carlese, Charles Carlese, Joseph Castelli and Santo Lazaro, at the time when, and the place where they, as aforesaid, did pass, utter and publish said false, forged and counterfeit coin, well knowing the same to be false, forged and counterfeit, and also for that they the said Salvatore Macchione, alias Lombardi, Angelo Pastore, Joseph Carlese, Charles Carlese Joseph Castelli and Santo Lazaro, then late of the City and County of New York, in the District and Circuit aforesaid, heretofore to wit, on the 3rd day of October, in the year of our Lord one thousand eight hundred and ninety-five, at the Southern District of New York, and within the jurisdiction of the Court last aforesaid, feloniously and with intent to defraud some person unknown did have in their possession a certain
7 falsely made, forged and counterfeited coin, in resemblance and similitude of the silver coin of the United States called and known as the standard silver dollar, which had theretofore been coined at the mints of the said United States, they the said Salvatore Macchione, alias Lombardi, Angelo Pastore, Joseph Carlese, Charles Carlese, Joseph Castelli and Santo Lazaro, at the time when, and the place where they did have in their possession, as aforesaid, said false, forged and counterfeited coin, well knowing the same to be false, forged and counterfeited, and thereupon upon the conviction aforesaid, it was considered by the said Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, and ordered and adjudged that the said Charles Carlesi, otherwise called Charles Carlese, for the said crime of selling and having in possession counterfeit silver dollars, whereof he was so convicted, as aforesaid, be imprisoned in the Monroe County Penitentiary for the term of three and one-half years, and pay a fine of one dollar, as by the record thereof doth more fully and at large appear, and the said Charles Carlesi, otherwise called Charles Carlese, late of the Borough of Manhattan of the City of New York, and the County of New York, aforesaid, having been so, as aforesaid, convicted of the said crime of selling and having in possession counterfeit silver dollars in the manner aforesaid, afterwards, to wit, on the 9th day of July in the year of our Lord, one thousand nine hundred and seven, at the Borough and County last aforesaid, with intent to defraud, feloniously did forge a certain instrument in writing, which said forged instrument in writing is as follows that is to say:

8 Fiss Doerr & Carroll Horse Company,

Largest Dealers in Horses in the World,

[Principle Office 153 East 24th Street.]*

NEW YORK, *July* 9, 1907. *190–*.

Pay to the order of S. Berman $3,200 00/00 Three Thousand

[*On margin in copy.]

two hundred 00/00 Dollars Account sales not over Thirty Five Hundred $3,500$.

To the Mercantile National Bank, New York.

FREDERICK WAGNER,
President.
JOSEPH D. CARROLL,
Treasurer.

153,496. Treasurer.

against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

Second Count.

And the Grand Jury aforesaid by this indictment further accuse the said Charles Carlesi, otherwise called Charles Carlese, of the crime of forgery in the second degree, as a second offence, committed as follows:

The said Charles Carlesi, otherwise called Charles Carlese, late of the Borough of Manhattan of the City of New York, in the County of New York, aforesaid, having been so as aforesaid convicted of the crime of selling and having in possession counterfeit silver dollars mentioned, described and set forth in the first count of this indictment, to which reference is hereby made and in the manner mentioned and set forth therein, afterwards to wit, on the 9th day of July, in the year of our Lord one thousand nine hundred and seven, at the Borough and County last aforesaid, with intent to de-
9 fraud, did feloniously utter, dispose of, and put off as true, a certain forged instrument and writing, being the same forged instrument and writing set forth in the first count of this indictment, to which reference is hereby made, the said Charles Carlesi, otherwise called Charles Carlese, then and there well knowing the same to be forged, against the form of the statute in such case made and provided, and against the peace of the People of the State of New York and their dignity.

CHARLES S. WHITMAN,
District Attorney.

Endorsement: Cal. No. 6614. No. 85667. Counsel Abraham Levy Brande & Weber. Filed 29 day of Nov. 1911. Pleads not guilty Dec. 5/11. The People vs. Charles Carlesi alias Charles Carlese. Forgery in the Second Degree as a Second Offense. Charles S. Whitman, District Attorney. A true bill. Eugene S. Benjamin, Foreman. Witnesses: Frank Wagner, Louis Van Cook, Geo. H. Cooper, Louis Bachner, George Dougherty, H. Frankel, James J. Dolan, George Bogg.

10 *Case.*

Court of General Sessions of the Peace, City and County of New York, Part III.

THE PEOPLE OF THE STATE OF NEW YORK
against
CHARLES CARLESI alias CHARLES CARLESE.

Before Hon. Otto A. Rosalsky, J., and a Jury.

NEW YORK, *January 26th*, 1912, *etc.*

Indicted for forgery in the second degree as a second offense. Indictment filed November 29th, 1911.

Appearances:

For the People, Assistant District Attorney W. H. L. Edwards and Deputy Assistant District Attorney Weller.

For the Defendant, Messrs. Brande & Weber, Abraham Levy, Esq., of Counsel.

NEW YORK, *January 26th*, 1912.

After one talesman had been called and duly sworn as to his qualifications, the trial of the case was adjourned until Wednesday, January 31st, 1912.

11 NEW YORK, *January 31st*, 1912.

Trial Resumed.

Mr. LEVY: May it please your Honor, the defendant at the bar, Charles Carlesi, was indicted by the Grand Jury of this county charged with the crime of forgery in the second degree, and he is charged in that indictment with that crime as a second offense.

Preliminary to the selection of a jury in this case, and before proceeding with the trial, I have a motion to address to your Honor, and for your consideration, which I think of great moment, and very seriously concerns the welfare of the man I am called upon to defend.

My motion, if your Honor please, stated concisely is, that you strike from the indictment so found by the Grand Jury of this county, the allegation therein set forth, which charges the defendant as for a second offence, upon the ground, briefly stated, that that offence, if committed, had been entirely wiped out and obliterated and nullified by the action of the President of the United States, who, in the granting to the defendant of a full pardon for the offence with which he was charged in the Federal Court, thereby removed from this defendant the disabilities and stigma of such first conviction.

In order that the matter may be squarely presented to the Court I am willing to state upon the record now the confession to the first

offence, that is to say, we admit upon the record the fact that the defendant, at the time stated in the indictment, was convicted as therein stated before a jury in the Federal Court, and was sentenced to be punished as therein set forth for the period of time
12 therein described. Then, after that is interposed, I desire to offer in evidence a pardon granted over the signature of the President of the United States, and duly attested to by the Secretary of State, the object of that method of proof being to raise the question which I desire to present to your Honor squarely. It is in the nature, I take it, of a plea of confession and avoidance, and my motion, after that is done, will be to strike out those allegations in the indictment, and to nullify any force that they may have, and it seems to me that will be the only method of proceeding, by concurrence of the learned District Attorney to the method of procedure.

Mr. EDWARDS: If that procedure meets with the Court's approval the people have no objection to it.

The COURT: There is no objection.

Mr. LEVY: Now then, it may go upon the record that the defendant at the bar admits and confesses that at the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held in the City of New York, on the 20th day of December, 1895, before the Hon. Addison Brown, then a Judge of the said court, he was in due form of law convicted of a crime, to wit, selling and having in possession, counterfeit silver dollars, upon which conviction, he, the defendant, at the bar, was sentenced by the Judge then presiding, to be imprisoned in the Monroe County Penitentiary for the term of three and one-half years, and to pay a fine of one dollar.

I take it, gentlemen, that that is a full enough statement, is it not? The defendant admits the identity of himself with the person named in that indictment just described.

13 Mr. EDWARDS: I think it should be shown upon the record that the defendant served his sentence.

Mr. LEVY: Yes, and that the defendant served his sentence under that conviction and was discharged September 10, 1898, from such imprisonment.

The COURT: You have stated, Mr. Levy, that this pardon was a full pardon and not a conditional pardon?

Mr. LEVY: That is right, sir, and I am going to demonstrate that it is a full pardon in a few moments. I have to state the fact that the man was convicted and that he served his term, and after service of the term imposed upon him, the President, by reason of certain investigations which he had caused to be made, granted to this defendant a full pardon over his own signature, and restored him to his civil rights. That may be illustrated in many cases where convictions have been ascertained to have been unjustly proved. I have in mind a case which no doubt your Honor is familiar with, a case which I tried, a man by the name of Schlessel, who was convicted and served his time, and the decision of the Court of Appeals did not

come down until the full term had been served, and in that case his full rights were restored.

The COURT: There is no doubt that the President of the United States, or Governor, by virtue of the Federal and State constitutions, respectively enjoys absolute power to wipe out any blot upon a man's character, if such blot be the result of a conviction by a court of justice, either upon his plea of guilty or conviction upon trial, and the decisions hold that a pardon reaches the punishment imposed, as well as the guilt of the offender, but the pardon, I believe,
14 should state those facts. You see, a Governor grants a man a pardon entitling him to vote, he restores him to citizenship. It depends upon the character of the pardon given to a defendant.

Mr. LEVY: Well, I will argue that when I offer the pardon, and when your Honor comes to consider my motion. The decisions of the courts of the United States, in point with your Honor's suggestion, go further than that which your Honor states to be the effect of a pardon. The President has more power than a Governor. The President of the United States can wipe out an offence by pardon before a man is indicted, before he is convicted, when he is convicted, after he is convicted, and during the time of his trial, at any time. I have the language of the Chief Judge of the Supreme Court to sustain that.

The COURT: There is no doubt about that.

Mr. LEVY: And a Governor cannot do that.

The COURT: The Governor only has power to grant commutations and pardons after conviction, for all offences except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to the regulations provided in this chapter. The President has greater authority, although I fail to understand why a man should be pardoned for something concerning which there is no conviction. An indictment is not evidence of a man's guilt.

Mr. LEVY: The reasons that move an executive to exercise the great and wonderful power of pardon need not be stated upon a record. He stands supreme. He needs not, as we have in courts of justice, a record of each transaction. That which actuates the pardoning power is solely and supremely in his own mind. Such criticism was made concerning the act of a Governor in a
15 Southern State, who, by wholesale pardoned a number of malefactors. He was not called upon under his constitution and the Constitution of the United States, to explain his reasons. He simply pardoned; and then our courts have passed upon the effect of a pardon, and concerning that, at the right time, I want to argue the matter.

Of course, our judiciary passed upon the legal effect of a pardon, but it cannot pass upon whether the Governor or President exercises that power wisely.

The COURT: Oh, the president or Governor is supreme. No judicial action can review it. There is no doubt about that.

Mr. LEVY: Absolutely. Now, so as to get the record in the form that I would like to have it, I make these admissions upon the

record, and now, with the Court's permission, I offer in evidence the pardon of President Theodore Roosevelt of this defendant, bearing date, the 3rd of October, 1904, and so that I may preserve the original, I would like to read it into the record.

The COURT: Yes, that will be done.

Mr. EDWARDS: At this point I want to raise the objection to the admission of the pardon under the authority of the Price case, by reason of the fact that it in no way affects the motion before the Court on this matter.

The COURT: The defence is entitled to present such record as will permit the proper review of the case. I shall receive the pardon, and later, when the jury is impaneled, I shall explain to the jury the effect, if any, which the pardon has on the first conviction.

Mr. LEVY: This may be regarded, I take it, as defendant's exhibit what?

The COURT: Defendant's Exhibit A.

Mr. LEVY: Defendant's Exhibit A (reading):

16 "Theodore Roosevelt, President of the United States of America, to all to whom these presents shall come, Greeting:

Whereas, Charles Carlesi was indicted in the United States Circuit Court for the Southern District of New York, for selling and having in possession counterfeit silver dollars, in violation of Section 5457 of the Revised Statutes of the United States, pleaded guilty, and on January 3rd, 1896, was sentenced to imprisonment for three and one half years in the Monroe County Penitentiary at Rochester, New York, and to pay a fine of one dollar;

And, Whereas, he served his term of imprisonment, and after earning all allowances for good conduct, was discharged September 10th, 1898, and since his discharge has conducted himself in an exemplary manner;

Now, Therefore, be it known that I, Theodore Roosevelt, President of the United States of America, in consideration of the premises, and divers other good and sufficient reasons, me thereunto moving,

Do hereby grant unto the said Charles Carlesi a pardon and restore his civil rights.

In testimony whereof I have hereunto signed my name and caused the seal of the Department of Justice to be affixed.

Done at the City of Washington, this 3rd day of October, in the year of Our Lord, one thousand nine hundred and four, and of the independence of the United States, the one hundred and twenty-ninth.

(Signed) T. ROOSEVELT.

By the President,
HENRY M. HOYT,
Acting Attorney General.

with the seal of the Department of Justice."

17 Mr. LEVY: I would like to make a slight correction in my statement. I said it was countersigned by the Secretary of State. It is signed by the Acting Attorney General. Now, then, if your Honor please, it seems to me that I have sufficient upon the record to bring the question that I want to urge upon you fairly and squarely before the Court, and I move to strike from the indictment found by the Grand Jury of this county against this defendant, upon which he is now being tried, I move to strike therefrom every allegation in said indictment contained, which sets forth any fact or matter relating to such first conviction, and also request the Court to make the direction and order that this case proceed against this defendant only as for a first offence.

As a preliminary to my motion, I wish to state to your Honor that the Constitution provides that the President shall have power to grant reprieves and pardons for all offences against the United States, excepting in cases of impeachment. That is provided for in Article 2, Section 2, of the Constitution of the United States—the unlimited uncontrolled power of pardon. Now, my authority for my motion I find in the United States Court decisions. Bearing in mind that the question now presented, so far as I have been able to ascertain by every bit of effort and attempted research, has never been passed upon in the way that it is now presented, in any court in this State—there is a decision in this State where the question arose similarly, not exactly, where the pardon was granted by the Governor of the State of Georgia. A man by the name of Price, who was indicted here charged as for a second offence; that case I handed to your Honor an ex-erpt of a decision of the General

18 Term, the opinion in that case being concurred in, though there is a dissenting opinion there as well, being concurred in by a majority of the Court.

The COURT: No, there is no dissenting opinion.

Mr. LEVY: No, your Honor is right about that. The dissenting opinion is in the Sickles case.

The COURT: The Sickles case.

Mr. LEVY: Yes, and I want to state there every fact against me as fairly as I want to state every fact for me upon the record, in which the statement is made by the learned Court to whose attention the Federal decisions had been called, that "The cases cited from the Supreme Court of the United States hold that since the pardoning power is conferred upon the Executive by the Constitution, it is not within legislative control or restriction, and hence legislature cannot diminish full absolution which the pardon imports."

Now, as a preliminary, if your Honor please, I have to read to you an ex-erpt from the decision of the Supreme Court of the United States, in the matter of Garland, 4 Wallace, page 380, which I think epitomizes what I have to say with regard to the effect of a pardon upon a person convicted in a Federal Court.

"The power conferred is unlimited"—meaning the pardoning power of the President—"with the exceptions stated. It extends to every offence known to the law and may be exercised any time after

its commission, either before legal proceedings are taken or during their pendency or after conviction and judgment"—you see, thereby differing from the provisions of the State Constitution with regard to the State Executive's power—"either before legal proceedings are taken or at any time after the commission of the offence, or during the pendency of legal proceedings or after conviction and judgment. This power of the President is not subject to legislative control.

19 The COURT: That is evidently to comply, if you will pardon the interruption, with that provision of the Federal law which disqualifies an accomplice from giving testimony.

Mr. LEVY: Well, it simply exemplifies the fact that there was no limit to the President's power: "This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon nor exclude from his exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered in legislative restrictions. Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. The pardon reaches both the punishment prescribed for the offence, and the guilt of the offender, and when the pardon is full, it releases the punishment and blots out the existence of guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction—the pardon—it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him new credit and capacity."

Now, the one case against the proposition I advance, I find in this State, is that Price case, to which I again advert, but in that case it was the application of the law of this State to the construction of the law of this State with regard to the effect of the act, not of the President of the United States, but of the act of a Governor of another State, having no more power to in any way grant further privileges than would our own Governor have. The point

20 that I make is that this having been a Federal offence, or an offence against the laws of the Federal Government by this defendant, for which he was convicted, and that the President of the United States had pardoned that, under the decisions of the Courts of the United States, that pardon obliterated all his guilt, so that, in construing the law bearing upon this proposition, the application of the principles of law must come, not from the State adjudication, but must come from the Federal adjudications, which declare the force and effect and operation and power of the Chief Executive's pardoning prerogative.

Now, in point with that, I want to read to your Honor what was said by Judge Marshall in the case of Elmendorf against Taylor, which is reported in the 10th Wheaton, page 109. "The judicial department of every government is the appropriate organ for construing the legislative acts of that government—on this principle the construction given by this (the Supreme) Court to the Constitu-

tion and laws of the United States, is received by all as the true construction; and on the same principle the construction given by the Courts of various States to the legislative acts of those States, is received as true, unless they come in conflict with the Constitution and laws or treaties of the United States."

In other words, that means that the Courts of all subordinate branches of lower grade in government are compelled to follow the law as declared by the Supreme Court, enacting a law of the Government, and the adjudications thereon, by the highest tribunal of justice in the land.

Now, if the Supreme Court of the United States says, as it has said, that the act of the President of the United States has wiped out and destroyed and nullified every act of criminality that this
21 man was guilty of, and has restored him to his civil rights, can you tell me how in reason it can be argued that the Legislature of the State of New York, by passing this so-called second offence law, can create a higher grade of punishment against this man, that the Supreme Court of the land has said shall not exist against him? And it has been said that the allegation as to a second offence is an essential ingredient of his criminality in the matter, but the United States Supreme Court says there has been no criminality, because it is destroyed, wiped out, and pardoned. Now, if it is destroyed, wiped out and pardoned, how can the District Attorney allege an indictment which contains within it an ingredient which the Supreme Court of the land says should not be there? There is the situation with regard to that. Now, let me tax your patience just a trifle further, if your Honor please.

The COURT: I want to say that the Price case did not consider the proposition which was raised in the Sickles case, as to whether or not a prior offence is an ingredient of a second offence.

Mr. LEVY: It was in the Sickles case that laid it down flatly that the first offence was an essential ingredient of the criminality to be proven in the trial of the second case. In other words, if you charge it, you must prove it.

The COURT: There must be a first offence in existence.

Mr. LEVY: That is the point exactly. Now, the point I take is, and your Honor has stated it concisely and properly, there must be a first offence in existence, and says, the United States Supreme Court, that first offence is wiped away. Now if that be so, that exemplifies the force of the point that I am attempting to make.
22 Now, one other little ex-erpt I want to read to your Honor, from another case in the United States Court, in the case of Osborne against the United States, reported in the 91st Volume of United States reports, at page 478. The Court says: "The pardon in releasing the offence obliterates it in legal contemplation and removes the ground of the forfeiture upon which the decree rests and the source of title is then gone."

It was said by the Supreme Court of the United States in the Klein case, which your Honor will find reported in 13 Wallace: "To the executive alone is entrusted the power of pardon; and it is

granted without limit. A pardon includes amnesty. It blots out the offence pardoned and removes all its penal consequences."

Now, I urge that, while it may be true that the Legislature of the State of New York, which provided for a charge as for a second offence, intended that it should affect the punishment only, nevertheless, if the punishment which the Court would have to consider in case of a conviction is a penal consequence of his first offence, it cannot be said, if your Honor please, that a man charged with crime can approach the bar of justice with that same degree of security, if he is charged as a second offender. We cannot change human nature, and every juror that is called would naturally have in his mind the idea if he is trying a man as for a second offence. "Well, this man has been guilty of criminality before." His mind, the juror's mind, is not prone to be so open and clean as it would be if the man were charged as for a first offence. Try as he would, be as conscientious as he tries to be, nevertheless the insidious evil creeps into his mind, and the charge of the Court may be honestly well meant, but it cannot wipe away the proneness of the human
23 mind to ask for less proof in the case of a man who had been convicted before than a juror would ask in the case of a man who was brought before the Court as a first offender

I mention this to show that if there be an element about this case that should entitle this man to the granting of the motion which I urge upon your Honor, it is that consideration. While it is true that the Judge will tell the jury "The object of that proof was simply to limit me as to my power of punishment or to extend the grade of punishment," nevertheless, the great hardship has been done the defendant on his trial. I do not make that in any criticizing sense, but it is a matter that has appealed to every lawyer that has been called upon to try a criminal case, wherein the defendant has been charged as a second offender.

One other citation, your Honor, and then I shall have finished. I want to read to you what the United States Courts said, the Supreme Court said in the case of Knote against the United States, which you will find reported in the 95th Reporter, at page 149, as to the effect of a pardon, and as also a particular reason that my motion should be granted: "The effect of a pardon upon the condition and rights of its recipient has been the subject of frequent consideration by this Court; and principles have been settled which will solve the question presented for our determination in the case at bar." The Court then recites a number of cases. "A pardon is an act of grace, by which an offender is released from the consequences of his offence, so far as such release is practicable and within the control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offence and restores to him all his civil rights."

Now, what does that mean? The disability that I am trying to wipe out of this indictment.

24 The COURT: The conviction.

Mr. LEVY: Yes, the conviction. Now, if the Supreme Court

of the United States is right and should be followed when it says "It releases the offender from all disabilities imposed by the offence and restores to him all his civil rights," surely that provision of this indictment should be stricken out, in obedience to the mandates and adjudications of the highest Court of Justice in the world, I believe, our Supreme Court of the United States. "In contemplation of law" —the Judge goes on and says—"it so far blots out the offence that afterwards"—mark those words "afterwards"—"it so far blots out the offence that afterwards it cannot be imputed to him to prevent the assertion of his legal rights."

Why, if the Supreme Court of the United States says it so far blots out the offence that it afterwards cannot be imputed to him, how can it be said that the Legislature of the State of New York, by its enactments, can put against this man a disability which the Supreme Court of this land says, should not be placed against him? And so, with all earnestness, your Honor, and in the absolute, sincere belief as to the righteousness of my contention, I submit this matter for your consideration and determination.

Mr. EDWARDS: May it please your Honor, it seems to me that it is elementary that the language of the pardon itself, is an important element in determining its effect. Mr. Levy suggested, in the opening of his argument, that one reason for granting a pardon might well be that the conviction had been improper. That feature is directly eliminated from this pardon by its language, which says that the defendant pleaded guilty to the charge in the Court below.

The purpose of the pardon itself is clearly shown by the
25 language, which states its purpose where it says: "The President of the United States of America, in consideration of the premises and divers other good and sufficient reasons, me thereunto moving, do hereby grant unto the said Charles Carlesi, a pardon and restore his civil rights." All of that clause is printed matter, the regular printed matter on the form of pardon with the exception of the words "Grant unto the said Charles Carlesi a pardon and restore his civil rights," showing that in this pardon at least, there is no question whatever of the propriety of the conviction, which was upon the plea of guilty of the defendant, entered by himself in open Court, and that the purpose of the pardon was to so far relieve him from the effect of the judgment in that case, as to restore him in full to all his civil rights.

The COURT: Well, now, what are a man's full civil rights?

Mr. EDWARDS: I take it that in view of that language there can be no question of the applicability to this case of the authority of the case of the People against Price, in 53 Hun, which Mr. Levy has already cited, and with which your Honor is perfectly familiar. If this were a pardon appearing on its face to have been granted because of an improper conviction, then there might be some force in Mr. Levy's contention, and if this were granted for any other specific purpose than to restore this man to his civil rights, which I take it to mean, in the common acceptance at least, his privileges of citizenship of which he was deprived, then I take it that there is no question that the Price case controls.

The COURT: Well, for instance, if a man were a witness in a Court of Justice, if you asked him "Were you ever convicted of a crime?" is not that interfering with one of the rights of a man? If a
26 person had never theretofore been convicted of crime, you would have no authority to ask him that question—that is, you could ask the question, of course.

Mr. EDWARDS: Yes, you could ask the question, and you are bound by his answer.

The COURT: Yes.

Mr. EDWARDS: I take it you could ask that question of any man, no matter who he was.

The COURT: That is true, but if a person had been pardoned, he would be obliged to say "Yes, I have been convicted" and to that extent his credibility as a witness would be a matter for the jury to consider.

Mr. EDWARDS: He would be entitled to show the pardon and the reasons for it, as bearing upon his credibility, also. I think there are authorities to that effect.

Mr. LEVY: May I take the liberty of interrupting? Your Honor has asked one question which is not answered. I think the Garland decision answers your Honor's question, "What are his civil rights?" It says: "If granted after conviction it removes all penalties and disabilities and restores him to all his civil rights—penalties and disabilities—one of the penalties enacted by the State of New York is that he cannot be tried as for a second offence.

Mr. EDWARDS: The weakness of the citation of the Garland case is the fact that the Garland case was cited directly in the Price case and therein discussed, and the decision in the Price case rendered directly in the face of the Garland case, certainly showing what our Court of Appeals thinks of its effect in such case.

Now, to proceed with the argument on Mr. Levy's motion. Now, we have the pardon showing the reason why it was granted
27 and the purpose of the pardon. We then come down to a discussion of what the act of the Court here should be on such a motion, and the answer to Mr. Levy's case and to Mr. Levy's contention is found directly in the Price case. The matter was fully discussed there. The Court stated, with reference to the effect of a pardon that "Of course, past acts cannot be obliterated, but the legal effect of those acts can be, and it remains true that the defendant was convicted, although he was subsequently pardoned." The Court then went on to discuss our statute providing for a heavier punishment in case of a second offence. Now, the Price case proceeded to discuss our statute providing for a heavier punishment for a second offence, and said that in that statute, "The fact of a previous conviction is made descriptive of the renewed offence, irrespective of the fact of pardon." The Court then goes on to show that under the police power of the State, and police power as they were particularly careful to point out there, and as defined by the Federal decisions, that under that power the Legislature has power to make persons previously convicted, whether pardoned or not, subject to more severe punishment on a subsequent conviction of felony in this State.

And then, in reviewing the Federal decisions, including, I think, all those cited by Mr. Levy, they stated that in none of those cases was the pardoned individual on trial for a second offence, and that in each case the pardon proved effectual to exempt the individual from a penalty which would have been incurred by him without the pardon, by reason of the crime for which he had been convicted.

Then the Court goes on and points out that under our sec-
28 ond offence statute, no penalty is incurred by the defendant for his first offence, but a heavier punishment is, or that it is provided that a heavier punishment may be inflicted for a subsequent felony committed here, by reason of the fact that he had been formerly convicted.

Now, the language that was cited by Mr. Levy from the Sickles case, in 156 New York, it seems to me, is misleading unless the context is taken into consideration. The Court there said, as Mr. Levy called your Honor's attention to: "I regard it as a necessary and logical conclusion that where the increased punishment is prescribed by the statute upon conviction for a second offence, that the prior conviction enters as an ingredient into the criminality of the prisoner." Now, it goes right on to say what the Court meant by that language. It says: "Not that the fact that the prior conviction tends in any wise to prove the commission of the second offence, but it aggravates the guilt of the prisoner and as a hardened or unreformed prisoner, subjects him to an increased punishment for the repeated crime."

The COURT: Well, the Court of Appeals did not really mean that. I do not think the language permits you to draw the broad inference that you do.

Mr. EDWARDS: I am quoting the language of the Court, your Honor.

The COURT: If a defendant who is indicted as a second offender remains silent and does not take the witness stand, you cannot use his prior conviction for any purpose, as claimed in the decision by the Court of Appeals.

Mr. EDWARDS: Yes, discussing an indictment for a second of-
fence, I think your Honor misapprehends the language; the Court there is discussing a case of a man indicted as a second of-
29 fender, and is discussing the effect of the second offence statute, and specifically says that, while it is an ingredient of the criminality of the defendant, and goes only to his punishment, that it is in no sense an ingredient or proof of this particular crime with which he is charged.

The COURT: That is true, the jury cannot consider the prior offence as bearing upon his criminality with a view to proving his guilt of the particular charge laid against him.

Mr. EDWARDS: There is nothing in the language I stated, your Honor—the language of the Court is this: "I regard it as necessary and logical conclusion, where an increased punishment is prescribed by the State upon conviction for a second offence, that the prior offence enters as an ingredient into the criminality of the prisoner." Now, it is the criminality of the prisoner and only with reference

to his punishment as is described in the next sentence: "Not that the fact that a prior conviction tends in any wise to prove the commission of the second offence, but it aggravates the guilt of the prisoner, and, as a hardened, unreformed criminal, subjects him to increased punishment for the repeated crime."

The COURT: Oh, yes.

Mr. EDWARDS: I was quite sure that your Hon- misapprehended the language as I read it. They are there discussing the purpose of the statute, and not discussing the effect upon the jury on the question of the second offence.

Now, this pardon, as I have already pointed out to your Honor, in no way is broader than the Georgia pardon under consideration in the Price case. The pardon is one simply to restore him to his civil rights. It is a pardon which recites that the man pleaded guilty in open court himself, so that there is no question of
30 an improper conviction, and therefore is not intended to relieve him from effect which the Price case held could not be eradicated, that he had been convicted, and in the absence of any statutory provision conferring on the President a greater power or control over the Legislature of this State, in the exercise of its police powers, we contend that he has no greater power and that the effect of this pardon is this, and no greater than that of a State pardon would be, that in the absence of any case in the Federal Courts on all fours with the motion made here, that the case presented here, the Price case is and must be controlling.

Mr. LEVY: Will your Honor pardon me just a moment? I want to direct your attention to the language of the Court of Appeals in the case of Forsyth against the Court of Sessions, which I just had brought down here. At the bottom of page 294 and at the beginning of page 295, the Court of Appeals quotes, verbatim and ad literatim from the opinion of the Garland case, without giving credit, however, to the United States Supreme Court; they use no quotation marks, but they use the exact language. The Court of Appeals in the Price case have affirmed, as they have the habit of doing in these days on general principles, without opinion——

The COURT: No, I would not say that. The Court of Appeals has recently affirmed three murder cases without writing any opinion.

Mr. LEVY: Well, in the face of what the President of the United States is saying about delays in criminal courts and all that sort of thing, they are apt to do that. Now, if your Honor will look at that, you will see that Judge O'Brien, writing the opinion in that case, said: "A pardon reaches both the punishment prescribed for the offence and the guilt of the offender. It releases the
31 punishment and blots out the existence of guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. It removes the penalties and disabilities, and restores him to all his civil rights. It makes him. as it were, a new man, and gives him new credit and capacity."

Now, that is a later case than the Price case.

Mr. EDWARDS: What was the question in that case?

The COURT: It was on a suspension of sentence.

Mr. LEVY: Yes, this was decided in 1894, 141. The Price affirmance was 119. The complexion of the Court of Appeals changed, the personnel of the Court changed.

The COURT: Why, Mr. Levy, I can cite you offhand one hundred cases upon very important subjects on criminal law where the present Court of Appeals has disagreed with former members of the Court. One case in particular which is of deep interest and which will arise some day, a case of arson in the first degree. In the old Fanshaw case, Mr. Brooke raised the question that if a man set fire to a trunk in a building for the purpose of obtaining the insurance thereon, and he did not intend to set fire to the building he was not guilty. The Court of Appeals dismissed such contention and held that if he set fire to a trunk in a building, with purpose, the consequences which would follow as the result of such purpose exposed him to prosecution for arson, and affirmed the conviction. In a civil case a woman was insured. A condition of the policy was that, in the event of a fire in a burning building she lost her life, her heirs and executors could claim the insurance. It happened that a fire took place in a bed in which this woman slept,
and she was burned to death, but no part of the building
32 was burned. The fire had to be in a burning building and
no part of the building was burned and the Court of Appeals said the woman was not entitled to recover. Now, if you can draw any distinction between those two cases you will be helping the Court. In the criminal case they pooh-poohed the present proposition, and in the civil case, where money rights were dependent upon the verdict, they held to the contrary. Of course, the complexion of the Court changes. Men have different ideas. However, I, as a Judge, must follow the Court of Appeals' decisions. They are my monitors. I want to say to you, Mr. Levy, that if it were not for the decision in the case of the People against Price, which was affirmed by the Court of Appeals, I should be inclined to grant your motion. I do believe that the reasoning adopted by the United States Supreme Court is sound, and is safe from attack. If a first conviction is an essential ingredient of the offence charging a defendant as a second offender, and if the punishment to be imposed upon a second offender is to be more severe than as to a first offender, and if, in addition, you have to show the existence of the prior offence of which he was convicted and such prior offence has been wiped out, I fail to understand why the Court of Appeals should have held, for they have adopted the opinion in this Price case, that past acts cannot be obliterated, but the legal effect of them can be. In the Garland case, the Court said: "A pardon reaches both the punishment prescribed for the offence and the guilt of the offender, and when the pardon is full, it releases the punishment and blots out the existence of guilt, so that in the eye of the
law, the offender is as innocent as if he had never committed
33 the offence." (Reading.) Now, if a man's guilt is wiped
out by an act of the President of the United States, if his punishment is wiped out, and the disabilities which flow as a result of the conviction are wiped out of existence, then how can a prior

conviction which, so far as the Federal Courts are concerned, and as to which the Federal decisions hold, is wiped out of existence, be pleaded in an indictment as an ingredient of the offence? In view of the fact that in the case of the People against Price they referred to the Garland case, and do not seem to take the view which this Court does take——

Mr. LEVY (interposing): They tried to distinguish it, your Honor.

The COURT: Well, they simply said, of course, "past acts cannot be obliterated." That is true, in a sense; the physical fact cannot be obliterated but the consequences which flow from such act certainly have been obliterated; there is no doubt of it; but, as I have said, Mr. Levy, in view of the fact that the Court of Appeals sustained the decision in the case of the People against Price, without opinion, I am constrained to deny your motion. If you had submitted to me the questions in the original proposition I am frank to say that I would not have followed the decision in the case of the People against Price, for this reason: In the case of the People against Fabian, the Court of Appeals held that a person who was convicted of crime and upon whom sentence is suspended, does not forfeit any of his civil rights. Fabian, as you know, was indicted for illegal registration because he had been theretofore convicted of crime. The Court of Appeals held that, there being no judgment, there was no conviction. Now, the Legislature empowers the Grand Jury to indict a person as a second offender,
34 if such person was heretofore convicted of a crime and not sentenced. So the Legislature distinguished between a suspension of sentence and a judgment of conviction. There is another provision in the Code which deals with habitual criminals, who have been pardoned and nothing has been said upon the subject of second offenders—in relation to cases where prisoners have been convicted and pardoned.

However, in view of this decision, which I am constrained to follow, I shall deny your motion, and later in the case when the jury is empaneled, and if the case goes to the jury, I shall explain to them the effect and purpose of pleading in the indictment the prior conviction of the defendant, and the purposes to which the jury will be limited in the consideration of such prior offence.

Mr. LEVY: Now, if your Honor please, will you let me—of course, I bow to your Honor's ruling and decision, will you let me put upon the record an exception?

The COURT: Yes.

Mr. LEVY: And let me add one other word, please, your Honor. In the case of Sickles, the People against Sickles, the Court of Appeals recognized the iniquity—that is the only word I can use, the iniquity of putting upon a man who is presumed to be innocent, when he is brought to the bar, the handicap and the burden of having to meet an allegation as for a second offence, and the Court of Appeals said that Legislation should be had upon that proposition.

The COURT: Yes, there is no doubt about that, we ought to adopt the English system.

Mr. LEVY: Yes, and I have no doubt that your Honor will, under proper instructions to the jury, conserve the interests of the defendant.

The COURT: Yes, here is an anomalous case, that an offender who had been fifteen times convicted of crime who was not indicted as a second offender, cannot have the jury's attention brought to his past conviction unless he is so indicted; but if a person had heretofore been convicted of a crime, and is indicted as a second offender, you can bring that matter to the attention of the jury.

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Mr. LEVY: It sometimes proves a very efficacious weapon in the hands of the police, to threaten a man unless he does so and so, upon an indictment for a second offence.

The COURT: Yes, I shall instruct the jury at the proper time in the matter.

Mr. LEVY: I thank your Honor for your patience and consideration, and respectfully except.

Counsel thereupon proceeded with the selection and examination of a jury, and after four jurors had been examined and duly sworn, the Court admonished the jury in accordance with Section 415 of the Code of Criminal Procedure.

The COURT: Gentlemen, refrain from reading any newspaper accounts of this case.

The Court thereupon adjourned the further trial of the case until Thursday, February 1st, 1911, at 10:30 o'clock A. M.

NEW YORK, *February 1st*, 1912.

The selection and examination of jurors proceeded, and twelve jurors having been duly selected and sworn, the Court admonished the jury in accordance with Section 415 of the Code of Criminal Procedure.

The COURT: Gentlemen of the jury, do not discuss this case among yourselves, nor permit any person to talk with you about it, nor form nor express any opinion as to the guilt or innocence of the defendant, until the case is finally submitted to you. Refrain from reading any newspaper accounts concerning this case. It is absolutely essential that you do not discuss this case with any human being, because if you do, gentlemen, you not alone violate your oaths, but you take evidence so to speak, in the absence of the defendant. Under our law, evidence can only be taken in a criminal case, in the presence of the Court and Jury and in the presence of the defendant, excepting as to where a deposition be read in evidence. If a juror should converse with any person about this case, the Court would be obliged to nullify your work by ordering a mistrial. We have had two such occurrences in this building within the last year, and therefore, I trust that you gentlemen will observe the Court's admonition. There is another decided objection to jurors discussing the case. You must sit here and absorb the evidence. You have no right to express an opinion until you enter the jury room. Your minds must be free. You must sit here and listen to the evidence and endeavor to remember the evidence, and when you retire to the

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jury room, then and then only are you legally permitted to discuss the evidence and express your opinions thereon.

We will take a recess now, until 2 o'clock P. M.

Afternoon recess. Trial resumed.

Mr. LEVY: May it please your Honor, may I direct your attention to the fact that, while it is true that this indictment reads "The People against Charles Carlesi, alias Charles Carlese," the impression is conveyed by the use of the expression "alias Charles Carlese" that the defendant is under some sort of stigma.

The COURT: Yes, that is a misnomer.

37 Mr. LEVY: Yes, now, it is simply a matter of misspelling his name, and I protest, respectfully, against such designation.

The COURT: Yes, the Clerk simply complied with the provisions of the Code.

Mr. LEVY: I find no fault with the Clerk, your Honor. It depends upon how you pronounce it. C-a-r-l-e-s-i is the way he spells it.

Mr. EDWARDS: It was simply a difference in spelling.

The COURT: There is simply a difference in the spelling and the jury will so understand it.

Assistant District Attorney Edwards opened the case on behalf of the People, as follows:

May it please your Honor, Mr. Foreman, and gentlemen:

This defendant, as you have already been told, is charged in the indictment with forgery in the second degree, as a second offence.

Mr. Levy has told you that he intends to concede the fact of the first offence, which will save us the necessity of proving that, as his admission has the same force as the proof. I therefore, take it that he will concede that on the 20th day of December, 1895, this defendant was convicted in the United States Circuit Court, of counterfeiting silver dollars and was sentenced on that conviction to serve a term, I think, of three years and a half or thereabouts.

Mr. LEVY: Yes, that is right.

Mr. EDWARDS: In the Monroe County Penitentiary, and to pay a fine of one dollar.

Now, the People in this case will show you that this defendant is charged in this indictment with forging and uttering a forged check, a check of the Fiss, Doerr & Carroll Horse Company, on the

38 Mercantile National Bank, for the sum of $3,200. We will prove to you that, on the 15th of June, 1907, Messrs. Fiss, Doerr & Carroll issued a check to the order of one L. Bechner for the sum of $25. We will show you that the payee in that check took it to Carlesi's, the defendant's saloon and got Carlesi to cash it for him, and that Carlesi gave him the $25 cash for that check. We will show you that that check remained in Carlesi's hands until, I think, the 17th day of July, 1907. We will also show you that at that time, the defendant Carlesi had a bank acount in the Jefferson Bank; that between the 15th day of June and the 17th day of July he made some six different deposits in that bank account; that this particular

check was endorsed by him in the usual way and deposited in that bank account to the credit of his account, on the 17th day of July. We will show you that shortly after the 15th day of June, Carlesi and Schutzberger and Weiss were all in Carlesi's saloon; that at that time Carlesi produced this $25 check and that it was shown to a man who was then present, and a conversation took place between Carlesi and that man, in the course of which, after an examination of this genuine check for $25, this man said that it was all right, that he could make a check of that kind; and we will then show you what was done by Carlesi and the two witnesses Schutzberger and Weiss. We will show you that Carlesi told Weiss to go out and open a business account in any name he wished. We will show you that, in accordance with that suggestion of Carlesi's *suggestion* Weiss went to the 23rd Ward Bank in the Bronx, and opened a bank account, with $500 in cash furnished to him by Carlesi; that Carlesi further directed him to keep that account active, so that it should appear to be a business account, told him to make drafts from the
39 account and deposits in the account, and we will show you that that was done, that on several different occasions Weiss drew money from the bank and then deposited money in the bank, although he had no business in that neighborhood.

We will show you that again, in July, on the 9th, I think it was, Shutzberger and Weiss, Carlesi and a man who was in partnership with the defendant Carlesi, were together in Carlesi's saloon, and at that time Carlesi produced a check for $3,200, a check for $3,200 drawn on the Mercantile National Bank, and, handing that check to Weiss, said words to this effect: "Go down to the Mercantile National Bank and get that check certified." Shutzberger, Weiss and Carlesi, together with this fourth man who was with them, started downtown. They went to about opposite the entrance to the Brooklyn Bridge. There Carlesi said that he would not go any further downtown, as he did not wish to be seen.

Weiss, at his suggestion, remained with him, and Schutzberger and the other man who was there took this check for $3,200 and went down to the Mercantile National Bank, presented it and it was certified. It bears the bank's certification.

We will then show you that they returned, joining Weiss and Carlesi again, and returned to Carlesi's saloon. In Carlesi's saloon—or in the meantime the check was returned to Carlesi and he took it and looked at it. They went back to Carlesi's saloon, and when they got to the saloon, after they had had a drink or two, Carlesi gave this check to Weiss again and said, "Now, go up to the 23rd Ward Bank and deposit the check."

Carlesi, Weiss, Schutzberger and the same man, as I recollect it, who had been downtown with them, then went uptown to the
40 23rd Ward Bank. They all waited outside while Weiss went in and deposited this certified check for $3,200, together with $200 in cash.

They left then and again went downtown to Carlesi's saloon, and on the day following, Carlesi directed Weiss to go and draw a part of this money.

Weiss drew his check, I think it was for $2,400, and went up to the 23rd Ward Bank, with Carlesi, Schutzberger and this same man again. They waited outside while Weiss went in and presented his $2,400 check, which was cashed, and he came out and again returned to Carlesi's saloon and gave Carlesi the $3,400.

Then Carlesi said to Weiss, "Now, go back and get the other thousand." In the afternoon Weiss and Schutzberger, together, went back to the 23rd Ward Bank, Weiss with another check for $1,000, and he goes in and gets that cashed. He returns and goes down to Carlesi's saloon and gives Carlesi again the thousand dollars and Carlesi gives him $300 for his trouble.

The check, I forgot to mention, is drawn to the order of S. Berman, and S. Berman is the name in which Weiss opened his account in the 23rd Ward Bank.

We will show you that this check is a forgery, not only——

The COURT (interposing): Which check?

Mr. EDWARDS: The $3,200 check. Not only as to the handwriting on the face of the check, but we will show you that the check itself is a forgery. It is a check made in imitation of the genuine $25 check. The blank itself is made. We will show you that blank is made—I think we can show you who made it. We can show you by the man who made the genuine $25 check that he did not make the other check. We can show you that the writing in the
41 body of the check which resembles closely the writing in the body of the genuine check, is not written in the same hand; we can show you that the written signature on the face of the genuine check, or on the face of the forged check is not in the writing of the man who signed the genuine check, and we can go a step further, gentlemen, we can show you that that check for $3,200 is the offspring of this check of $25; we can show you that, without that $25 check, and when I say that, I do not mean any other check like it, I mean this one, this check for $3,200, could not have come into existence.

We can show you that that $25 check, as I have already told you, was handed to the defendant Carlesi and was in his possession continuously, up until a time subsequent to the use of these forgeries.

Is Mr. Wagner in Court? Now, if your Honor please, I would like to ask Mr. Levy if he will stipulate, as he said he would, the first conviction on the record in the form it is in in the indictment?

Mr. LEVY: I think I have already done that.

Mr. EDWARDS: As I understand it, we cannot take testimony until we have a jury, and we cannot take a stipulation until we have a jury.

Mr. LEVY: Not alone have I done it, but his Honor has passed upon my respective motions and I have taken my exceptions.

The COURT: But it is essential that the concession should be made in the presence of the jury.

Mr. LEVY: I do not want to waive whatever advantage can come to this defendant by reason of the exceptions.

The COURT: No, all that you will be obliged to do is this: Make your concession now with all the objections made before the jury

was impaneled, that they should be recorded and treated with
42 the same force and effect as though they had been repeated again.

Mr. LEVY: I make that concession, reserving to the defendant the same rights to except.

The COURT: The Court would require you to state your grounds of objections after the jury had been selected, but you asked the Court's permission to take your objections before the jury was impaneled, with a view to having the Court determine whether or not you would interrogate the jurors as to the fact of the defendant's prior conviction, whether it would have any influence upon them in determining the guilt or innocence of the defendant, and it was for that reason that the Court allowed you to make your grounds of objection known before the jury was impaneled. It is essential for the District Attorney to establish the prior conviction of the defendant under this indictment.

Mr. LEVY: Well, I understand that, sir, and in order that there will be no misunderstanding about the matter, I desire to repeat that every admission and concession made before the impaneling of this jury with regard to the prior conviction of this defendant, his service in expiation of that offence, and his subsequent pardon, all the facts may be repeated upon the record, reaffirmed, and the defendant reserves unto himself, with your Honor's permission, the same exceptions taken before.

The COURT: Yes, that is correct, and the Court will at the proper time instruct the jury how the prior conviction of the defendant is to be considered by them.

Mr. LEVY: Quite right, your Honor.

The COURT: No good purpose could be served at this time, if the Court were to explain the limitations to be placed upon the
43 prior conviction of the defendant, because the Court might be called upon to treat this subject from two different angles.

Mr. LEVY: Quite right, sir. I want the District Attorney to be assured that upon the record he can base as broadly as he likes, the concession I made at the time of the argument, for the purpose of striking from the indictment the allegations relating to the first offence, and it may be regarded as if it were repeated in extenso at this time, with your Honor's same ruling and the same exception to the defendant.

The COURT: Yes.

Mr. EDWARDS: What I want to get is the fact, the concession as to the first offence appearing before the jury so that the jury may know what it is.

The COURT: Well, read it.

Mr. LEVY: Shall I read it or do you want the District Attorney to read it?

Mr. EDWARDS: I can read it from the language of the indictment, if that meets with your approval.

Mr. LEVY: I will read it if you want me to.

Mr. EDWARDS: I do not care so much for the form as I do to have all the facts charged in the indictment with reference to that first

offence, in the form of your concession, so that this jury may hear what it is and understand it.

Mr. LEVY: Then I will state it. The defendant, reserving unto himself any possible advantage for the conservation of his rights by reason of the taking of the exception to the denial of his motion to strike from the indictment and to expunge any matter relating to his former conviction, the defendant again states upon the record or concession and confession, that on the 20th day of De-
44 cember, in the year 1895, at a Circuit Court of the United States of America——

Mr. EDWARDS: What is the date?

Mr. LEVY: I have it December 20th.

Mr. EDWARDS: That is right, I thought you said the 19th.

Mr. LEVY: At a Circuit Court for the United States of America, Southern District of New York, in the Second Circuit, held in the Federal Building, in the Borough of Manhattan, in the County of New York, before the Hon. Addison Brown, then a Judge of the said Court, the defendant at the bar was, in due form of law, convicted of a crime, to wit, selling and having in possession counterfeit silver dollars, upon the said indictment then and there in the said Court depending against him; and that, on the 3rd of October, in the year one thousand eight hundred and ninety-five, at the Southern District of New York, and within the jurisdiction of the Court last aforesaid mentioned, he, the said defendant at the bar, upon the conviction aforesaid, was ordered and adjudged for the said crime whereof he was so convicted, to be imprisoned in the Monroe County Penitentiary, for a term of three and one-half years, and to pay a fine of one dollar; that the defendant at the bar served the term of such imprisonment so directed and ordered by the said Court, and that the said defendant was thereafter duly pardoned by the President of the United States, and restored to his civil rights; and that the defendant having moved the Court to expunge and strike from the record, by reason of such pardon so granted him by the Chief Executive of the United States, claimed exemption under this indictment by reason thereof, and because of such pardon, and the Court having heard argument of counsel, denied said motion so
45-539 to expunge and strike from the indictment the allegations relating to said first conviction, and that the defendant was then accorded the privilege of an exception to the Court's ruling.

I have tried to state that as fully and as fairly as I know how.

Mr. EDWARDS: As I understand, Mr. Levy, it includes the concession that this defendant at the bar in this case is the same individual who was so convicted and sentenced as aforesaid?

Mr. LEVY: I say, the defendant at the bar.

Mr. EDWARDS: I say, that is as I understand it, that is correct, is it?

Mr. LEVY: Surely. Now, before we call the complaining witness, if your Honor please, I move you that you direct the learned District Attorney to elect under which count in this indictment he proposes to move this case. Your Honor will observe there are two counts in this indictment. The first charges the forging of the in-

strument, which is the subject matter of the indictment and the second charges the uttering of it, both of which counts are susceptible of a different kind, line and theory of proof. Each of them is susceptible of a different kind and line and theory of proof and testimony. The testimony that might be sufficient, for instance, with regard to a forgery, might not be sufficient with regard to the utterance of a forgery. I will admit, and we know, your Honor, that the penalty is the same both for the forgery and for the utterance.

The COURT: In order to convict one of uttering a forged instrument the People are obliged to establish the fact of forgery.

Mr. LEVY: Precisely.

The COURT: I deny your motion.

Mr. LEVY: Your Honor will please give me an exception.

* * * * * * *

540 NEW YORK, *February 9th*, 1912.

Trial Resumed.

The COURT: The motion made by the learned counsel representing the defendant to dismiss the indictment and to advise the jury to acquit the defendant, is denied, and an exception granted.

Gentlemen of the jury, in denying the motion made by the learned counsel, you must not assume, directly or indirectly, that the Court expresses any opinion upon the facts in the case. The facts are for you to determine, after the case is submitted to you.

Until then, you have no right to form any conclusion as to
541 the guilt or innocence of the defendant. When you shall have retired to the jury room, if the case should go to the jury, then, and then only, will you be at liberty to form or express any opinion upon the merits of the case. For the present, you simply sit here to absorb the evidence.

Mr. LEVY: If your Honor please, so as to preserve the record, I deem it my duty at this time to renew the motion made at the beginning of the case, to take from the consideration of the jury the question of a second offence, upon the grounds stated then, if your Honor please.

The COURT: Yes, the motion is denied.

Mr. LEVY: An exception, if you please.

The defendant rests, and in resting, if your Honor please, let me say that I do it without calling witnesses out of a sense of duty, and in the honest belief in the merit of my application made to you yesterday to advise the jury to acquit; and let me say, your Honor, that in so doing, I appreciate the great responsibility I assume in resting this case upon the People's case, without calling any witnesses for the defense.

The COURT: Now, there is one question, Mr. Levy, before you rest, that I desire to put to you, and that is, was the pardon offered in evidence at any time?

Mr. LEVY: Yes it was read in evidence.

Mr. EDWARDS: Only before the jury was empaneled, and I think it should be offered again, so as to be before the jury.

The COURT: But it was read into the record?

Mr. EDWARDS: Only at the time of Mr. Levy's motion before the jury was empaneled.

542 Mr. LEVY: Well, I offer that in evidence, to be read into the record, as I did in the beginning, and your Honor, I take it, receives it in evidence.

Mr. EDWARDS: The only thing I want to have made clear is this, if it is to be used from the reading in the record, I would like to have the pardon produced, so that the stenographer may note on the record the portions which are in a printed form, and the portions which are written in by hand.

The COURT: Yes.

Mr. LEVY: Well, I did not think it necessary to have it here. I have it in my office. I did read it in the record.

Mr. EDWARDS: Yes, but there is nothing to indicate the portions which are printed and those which are written in by hand.

The COURT: Suppose you send for it?

Mr. LEVY: I will, your Honor. May I ask your Honor to permit me to have read into the record the pardon later on when it comes from my office?

The COURT: Yes. Now, upon which count, Mr. District Attorney, do you wish to go to the jury?

Mr. LEVY: Yes, I desire to make my motion on that. On the entire record now, if your Honor please, I renew the motion made yesterday to compel the District Attorney to elect under which count in the indictment he proposes to submit the case to the jury.

Mr. EDWARDS: If your Honor please, the District Attorney would prefer not to make an election unless he be so directed by the Court, and it seems to me that the Sullivan case is in point, and that the District Attorney should not be required to elect.

543 The COURT: On the authority of the People against Weaver, 177 New York, Mr. Levy, I decline to direct the District Attorney to elect upon which count he will go to the jury, but will submit both counts to the jury under appropriate instructions.

Mr. LEVY: I very respectfully except, if your Honor please, but in passing, will your Honor permit me to say that there is absolutely no corroboration to support the second count of this indictment? The weakness of the theory of the District Attorney to submit that, must be apparent. That has been in my mind ever since the close of the People's case. However, I respectfully except.

The COURT: Yes.

Mr. LEVY: Now, if your Honor please, I renew the motion made at the close of the People's case, under the provisions of Section 410 of the Code of Criminal Procedure, to advise the jury to acquit, and upon the grounds then stated.

The COURT: Motion denied.

Mr. LEVY: Exception, if you please.

Mr. Levy thereupon closed the case on behalf of the defense.

Mr. Edwards closed the case on behalf of the People.

The COURT: The pardon was to be offered in evidence?

Mr. EDWARDS: Yes, sir.

Mr. LEVY: It is here.

It is marked Defendant's Exhibit A.

The COURT: It is marked in evidence. The matters which are printed should be so stated in the record and the written matter likewise.

Mr. LEVY: Very well.

544 The Court then admonished the jury in accordance with Section 415 of the Code of Criminal Procedure, and took a recess until 2:10 o'clock P. M.

After Recess.

Trial Resumed.

Mr. EDWARDS: As to Defendant's Exhibit A, the pardon, it is stipulated that the copy which the stenographer has made from the original, it being accurate, may be used in place of the original, which has been returned to the possession of the defendant.

Mr. LEVY: Yes.

A copy is marked Defendant's Exhibit A and the original Defenhant's Exhibit A is returned to the possession of defendant's counsel.

The following is a copy of Defendant's Exhibit A:

(The following words are printed:)

Theodore Roosevelt,
President of the United States of America,
(In script.)

To all to whom these presents shall come, Greeting:

Whereas

(The following words are written:)

Charles Carlisi was indicted in the United States Circuit Court for the Southern District of New York for selling and having in possession counterfeit silver dollars in violation of Section 5457 of the Revised Statutes of the United States, pleaded guilty, and
545 on January third, 1896, was sentenced to imprisonment for three and one-half years in the Monroe County Penitentiary, at Rochester, New York, and to pay a fine of one dollar and,

Whereas, he served his term of imprisonment, and after earning all allowances for good conduct was discharged September tenth, 1898, and since his discharge has conducted himself in an exemplary manner.

(End of first page.)

(Following words printed.)

Now, therefore, be it known, that I, Theodore Roosevelt, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby

(The following words are written.)

grant unto the said Charles Carlesi a pardon to restore his civil rights.

(The following words are printed.)
In testimony whereof I have hereunto signed my name and caused the seal of the Department of Justice to be affixed.
Done at the City of Washington this (written word) third (printed words) day of (written word) October (printed words) in the year of our Lord One Thousand Nine Hundred and (written word) four, (printed words) and of the Independence of the United States the One Hundred and Twenty- (written word) ninth.
(Written) T. ROOSEVELT.

[Seal of Department of Justice.]

(Printed) By the President:
(Written) HENRY M. HOYT,
(Written) *Acting* (printed) *Attorney General.*

546 *The Court's Charge.*

Hon. OTTO A. ROSALSKY, *J.:*

The COURT: Gentlemen of the Jury: The defendant, Charles Carlesi, is charged with the crime of forgery in the second degree, as a second offence.

The defendant, by entering his plea of not guilty to the indictment, raises an issue of fact which you must determine solely from the evidence admitted in this case.

An indictment is an accusation in writing, calling upon a person to answer a charge. An indictment is absolutely no evidence of guilt. The defendant in a criminal case is not called upon to establish his innocence. The burden of establishing his guilt throughout the case rests upon the People. In the introduction of evidence by the learned District Attorney, the defendant's counsel had a right to contest the case of the People step by step, and to dispute every theory and fact advanced against the defendant.

In this case, gentlemen, it has been a pleasure to have the issue tried by counsel on both sides, who conducted themselves in a gentlemanly and courteous way, each side presenting his case with ability, learning and impartiality. I desire also to convey to you my sincere thanks and appreciation for the unwearied attention and interest you have given to the evidence in this case.

The aim of justice is not vengeance. It is to ascertain the truth. The State is not entitled to a verdict, nor does it seek a verdict at your hands, unless you are convinced beyond a reasonable doubt as to the defendant's guilt. In the eye of the law this defendant is presumed to be innocent until the contrary is proved.

547 A person is guilty of forgery in the second degree who, with intent to defraud, forges an instrument or writing, being or purporting to be the act of another, by which a pecuniary demand or obligation is or purports to be or to have been created, increased, discharged or diminished, or in any manner affected, or by which any rights of property whatever are or purport to be or to have been created, transferred, conveyed, discharged, increased, or diminished, or in any manner affected, the punish-

ment for forging, altering, or counterfeiting which is not hereinbefore prescribed by which false making, forging, altering, or counterfeiting, any person may be bound, affected or in any way injured to his person or property.

A person is guilty of forgery in the second degree also under the following circumstances:

A person who, knowing the same to be forged or altered, and with intent to defraud, utters, offers, disposes of or puts off as true, or has in his possession, with intent so to utter, offer, dispose of or put off a forged endorsement, instrument or writing or other thing, the false making, forging or altering of which is punishable as forgery, is guilty of forgery in the same degree as if he had forged the same.

The terms "forge," "forged" and forging," the expressions "forge," "forged" and "forging," as used in the Penal Law, include false making, counterfeiting and the alteration, erasure, or obliteration of a genuine instrument, in whole or in part, the false making or counterfeiting of the signature, of a party or witness, and the placing or connecting together with intent to defraud different parts of several instruments. An instrument partly written and partly printed, or wholly printed with a written signature thereto,
548 and any signature or writing purporting to be the signature of, or intended to bind an individual, a partnership, a corporation or association, or an officer thereof, is an instrument or writing within the provisions of the Penal Law.

The instrument in this case contains two counts. The first count charges the defendant with the crime of forging the check, and the second count charges the defendant with the crime of uttering the check, knowing the same to have been forged, and with the intent to defraud some one. The indictment charges the defendant with the crime of forgery in the second degree, as a second offence. It was conceded by the learned counsel representing the defendant that, at a term of the Circuit Court of the United States for the Southern District of New York, the defendant, on the 20th day of December, 1895, was sentenced by the Hon. Addison Brown, then a Judge of said Court, to a term of imprisonment after a conviction for a crime duly had and obtained in said Court.

The defendant has offered in evidence a pardon issued by the then President of the United States of America.

The purpose of indicting a person as a second offender is not to draw to the attention of the jury that such person is a vicious or vile criminal, and for that reason it should be evidence of a persuasive character that because the defendant at some time in his life transgressed the law he is likely to have violated the law with reference to the present charge laid against him; such is not the purpose of indicting a person as a second offender. Under the English system, a person who is charged with a second offence, has the major offence,—that is the particular offence under consideration—heard by the jury first, and after a conviction, proof is offered as to
549 the second offence; so that, in the first instance, it should not be brought to the attention of the jury that the person on trial was heretofore convicted of a crime.

The purpose of that wise legislation must be manifest to you, because a conviction against a defendant has a tendency to load and weigh him down in the mind of a person who permits passion or prejudice to control his judgment when considering another charge against a defendant, rather than cool reasoning, which must be observed by a jury in taking cognizance of what the law says.

Now, in this country, we have a different rule, and that is, to charge the fact of the prior conviction in the indictment, as I have said, not for the purpose of bringing it to your attention that this defendant is a criminal and for that reason should be convicted; but he is charged as a second offender so that in the event of a conviction, the Court is limited in the imposition of the minimum sentence, and the punishment as a second offender is increased. Of course, gentlemen, whatever punishment might flow from your verdict, if it be one of guilty, has nothing to do with the merits of this case. You have no right to consider what punishment, if any, the Court would mete out to the defendant. You are therefore to consider the prior conviction solely and only for the purpose of determining whether or not the defendant was heretofore convicted of a crime, and if you so find, and if you find the defendant guilty of the forgery of the $3,200 check, you will convict the defendant of forgery in the second degree as a second offence. Now, you are limited solely to that and to nothing else.

In order to sustain the charge against this defendant, it will be necessary for you to find the fol-owing facts: Was this de-
550 fendant concerned in the forgery of the $3,200 check? Was he a party to that forgery? Did he aid and abet any other person to commit that crime? Did he directly or indirectly counsel and advise another to forge that instrument? If so, was the $3,200 check forged with the intent to defraud some one, and with a criminal intent was some one defrauded?

If you find from the evidence that the defendant was concerned with Weiss and Schutzberger, and any other person in the forgery of the $3,200 check, then whatever Weiss or Schutzberger or any other person did in connection with the $3,200 check can be charged to this defendant up to the time that the check was forged or uttered and disposed of as true, provided you find, if Weiss and Schutzberger were accomplices of the defendant in the commission of the alleged crime, that their testimony is corroborated in such manner as the law contemplates.

A person concerned in the commission of a crime, whether he directly commits the act constituting the offence, or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a principal.

The theory of the People is that this defendant, Weiss, Schutzberger, and another or others, were concerned in the commission of this crime. As I have said, if you find that Weiss and Schutzberger were concerned with this defendant, either in the commission of the forgery of the instrument, or with knowledge that the instrument was forged, and with intent to defraud some one the $3,200 check

was passed off, put off as true, and that money or property was obtained thereon, then in the eye of the law all three are prin-
551 cipals; and the law goes a step further and says: You cannot convict this defendant upon the testimony of an accomplice or accomplices, unless the accomplice or accomplices be corroborated by such other evidence as tends to connect the defendant with the commission of the crime of forgery, or with the commission of the crime of uttering a forged instrument, knowing the same to have been forged, with intent to defraud some person.

The statute does not declare what the character of the corroborative evidence must be. The effect of the testimony of Weiss and Schutzberger, and their credibility, are matters for you to pass upon. After weighing their testimony you can accept it as true or reject it as untrue. The sufficiency of their testimony rests entirely with you, and their testimony must be corroborated, in the law, in material particulars.

The Court of Appeals, in the case of the People against Elliott, said: "It is not necessary that the corroborative evidence of itself should be sufficient to show the commission of the crime, or connect the defendant with it. It is sufficient if it tends to connect the defendant with the commission of the crime. Nor need the corroborative evidence be wholly inconsistent with the theory of the defendant's innocence. The Court, before it should submit the case to the jury, should be satisfied that there is some corroborative evidence fairly tending to connect the defendant with the commission of the crime, and when there is, then it is for the jury to determine whether the corroboration is sufficient to satisfy them of the defendant's guilt."

It was also said by the Court of Appeals, in the case of the People against Everhardt: "The law is complied with if there is some evidence fairly tending to connect the defendant with the com-
552 mission of the crime, so that the conviction will not rest entirely upon the evidence of the accomplice."

Under our law, one accomplice does not corroborate another. There may be in a case one hundred accomplices, and ninety-nine of them do not corroborate the one, nor does the one corroborate the ninety-nine. There must be corroboration in the case, independent of the testimony of the accomplices, and, as I have said, the law does not impose a duty upon the People to furnish you with the character of corroboratory evidence which you would like to have in the case; but you must find the corroboratory evidence on the facts and circumstances in the case, if they legitimately point in the direction of guilt and to the exclusion of every other hypothesis but that of guilt; and where the facts and the circumstances are susceptible of two constructions, an innocent construction and a guilty construction, the law imposes the duty upon a jury of accepting the construction which is most favorable to the defendant, because the law says that every presumption is in favor of the accused, and there are no presumptions in favor of the People.

In the case of the People against O'Farrell, the Court of Appeals said: "While formerly the matter of corroboration of accomplices

rested with the Court, instead of being required by statute, still the principle that no person should be convicted upon evidence of an accomplice alone has long been asserted and regarded as practically imperative."

"There was a time in the history of this State when the testimony of an accomplice, by statute, need not have been corroborated, and nevertheless the Courts insisted that the testimony of an accomplice should be corroborated: and later in the history of our law,
553 Section 399 was passed, making it obligatory upon the People in a case where an accomplice's testimony is used, to have the testimony of the accomplice corroborated by such other evidence as tended to connect the defendant with the commission of the crime. In considering the character of the evidence required under that rule, it has been quite uniformly held that the corroboratory evidence must relate to some material fact or facts which go to prove the defendant's connection with or guilt of the crime charged. What appears to be required is that there should be some fact deposed to, independently altogether of the evidence of the accomplice which, taken by itself, leads to the inference not only that a crime has been committed but that the prisoner is implicated in it. It is not indispensable that such corroboration should be furnished by positive and direct evidence, but proof of circumstances legitimately tending to show the existence of the material facts would be sufficient to authorize a conviction. In one form or another, however, proof must be given whereby you are satisfied that there is evidence tending to connect the defendant with the commission of the crime. The corroboration must be of a character and quality which tends to prove the defendant's guilt, by connecting him with the crime. If there is evidence fairly tending to show such connection, so that the conviction will not rest entirely upon the evidence of an accomplice, then the law is satisfied."

Now, gentlemen of the jury, the People in this case, in order to establish the guilty knowledge and the intent, if any, which the defendant had in the commission of the forgery, or in the uttering of the forged $3,200 check, were allowed to offer in evidence a check amounting to $3,800. The purpose of offering in evidence the $3,800 check was not to draw to your attention that this
554 defendant committed another offence, and for that reason is likely to have committed the present offence. Such was not the purpose in allowing in evidence the $3,800 check. It is an elementary principle of law that proof of the commission of one crime is not admissible in evidence upon the trial of a person for another crime, when its sole purpose is to show that a defendant has been guilty of another crime and would consequently be more likely to commit the particular offence charged against him. The general rule is, that when a defendant is put upon trial for one offence, he is to be convicted, if at all, by evidence which shows that he is guilty of that offence alone, and proof of other acts is wholly excluded. Such proof tends necessarily and directly to load down a defendant with other acts of wrongdoing, and has a tendency to prejudice a defendant in the minds of a jury on the question of his

guilt or innocence. There is, however, an exception to this rule, and that is, evidence of another crime of a similar character is competent, to prove the specific crime charged, when it tends to establish the criminal intent and guilty knowledge, if any, with which the alleged act charged in the indictment was committed. Intent is the state of mind, and that is a thing difficult to be proved by direct evidence. That is the reason for the rule, that in all cases where intent is requisite to, and constitutes a necessary and essential element or part of, a crime with which a person is charged, testimony of such other act, conduct or declaration of the accused as tends to establish his intent or guilty knowledge, with reference to the particular transaction laid in the indictment, is competent. Such evidence as to the other act is not received for the purpose of showing the commission of a crime other than the one charged in the
555 indictment, but for the purpose of showing the alleged intent with which the alleged act charged in the indictment was committed, and it can be considered by a jury only for that purpose, and for no other purpose.

In the case of the People against Everhardt, a forgery case, the Court of Appeals said, as to proof of another forged check: "Such proof is not received for the purpose of showing other crimes than that charged in the indictment, but for the purpose of showing the guilty knowledge and intent which are elements of the crime charged, and it can be considered by a jury only for that purpose."

Even if you should come to the conclusion that the defendant was a party to the forgery of the $3,800 check, or to its uttering with intent to defraud, you cannot convict him of the crime charged in the indictment, unless you conclude from the evidence that the defendant either was concerned in, or aided and abetted another in committing the forgery of the $3,200 check, or that he aided and assisted another in uttering, putting off or disposing of as true the $3,200 check; and as bearing on that branch of the case, gentlemen, the $3,800 check relates only to the subject of intent or guilty knowledge with which the alleged particular act was committed. It cannot be considered for any other purpose.

The People in this case called an expert witness. The general rule of law is that witnesses must testify to facts within their own knowledge, and not express their opinions or inferences thereon. To this rule there are some exceptions, among which is the testimony of experts. The admission of expert opinions as evidence, by persons specially qualified by skill and experience to speak as such, has been a matter of development, both in this country and in England.

The law of this State permits those who are skilled in
556 a particular science, art, trade or occupation, not only to testify to facts, but also to give to the jury their opinions upon questions of a scientific nature. That is allowed because experts are supposed, from their experience and study, to have peculiar knowledge upon the subject of inquiry, and experts are thus supposed to be more capable than laymen of drawing conclusions from the facts, and to base their opinions upon them.

In determining the value of the testimony of an expert, you are

to consider his learning, professional standing, opportunities for study, his experience, and above all his integrity. It is of great importance that the facts upon which the expert draws his conclusions shall be found to be satisfactorily established, since a false premise may render such opinion valueless. You are also to consider whether the expert witness is disinterested, unbiased and otherwise credible. The testimony of an expert as to handwriting is the expression of the opinion, under oath, which he entertains as based on the examination which he has made, by a comparison of the disputed writings with the concededly genuine writings or papers or instruments. One of the purposes of expert evidence is to aid the jury in their deliberations and in their review of the evidence.

In the case of Gay against the Union Mutual Life Insurance Company, Mr. Justice Woodruff, in his charge to the jury, which has been referred to with approval by the Courts of our State, said: "Where an expert of integrity and skill states conclusions which are the necessary or even usual results of facts upon which his opinion is based, the evidence should not be lightly esteemed or hastily discredited, but, after all, the question of fact in issue is not for
557 the expert to decide. The question of fact in this case is neither for the expert nor for the Court. It is for you to decide upon the sound judgment, under the oaths which you have taken."

Where the facts, although relating to a subject of a scientific character, can be placed before a jury, and they are of such a nature that jurors generally are competent to form opinions in reference to them, and to draw inferences from them as for example by a comparison of the checks, of the writings, it is within your power, and indeed it is your duty, to form your own opinions regarding those things and objects which you yourselves may have observed, or which may have been pointed out to you by the expert, and to draw your own conclusions from the facts independently of the opinion of the expert.

Our Courts have said that the testimony of an expert witness is entitled to the same credit, and is to be governed by the same rules as are applied to the evidence of other witnesses, and should have such weight with the jury as they believe it is entitled to. Expert testimony should not be accepted or rejected inconsiderately, but is to be weighed and considered by you the same as any other evidence; and, after weighing and considering such testimony, you are at liberty to disbelieve it when it is improbable or when it is discredited, or when you believe that any expert witness has testified falsely or was mistaken with respect to any material fact or opinion. Expert testimony should be received with caution, and the reasons or opinions of experts are not conclusive upon the jury. In other words, you should not blindly receive expert testimony, but you are to intelligently examine the matters testified to by the expert, in the light of your own general knowledge and understanding. The
558 ultimate weight to be given to the testimony of the expert is a question to be determined by you, and there is no rule of law which requires you to surrender your own judgment, or to give a controlling influence to an opinion of ascientific character.

You, therefore, must make up your own judgment, based upon your own understanding and your own belief, as to whether the $25 check was used as a model or pattern, in order to counterfeit, forge or make therefrom the $3,200 check.

It is contended that the defendant received the $25 check; that the endorsement thereon is his signature; that he had it in his possession for a considerable length of time. You must be satisfied from the evidence that the defendant, in fact, did have the check in his possession for a considerable length of time, and that the defendant received the check, and that he was the person who endorsed it. If you come to a conclusion beyond a reasonable doubt that the $25 check in the possession of the defendant was used as a model or pattern to produce the $3,200 check, and that the $3,200 check was produced therefrom with the knowledge and consent of the defendant, and that this defendant was concerned in or aided and abetted any person or persons in causing the $3,200 check to be forged or uttered, and with a criminal intent the $3,200 check was prepared or uttered with intent to defraud, you may convict this defendant of the crime of forgery in the second degree; but if you come to the conclusion that there is a reasonable doubt as to whether the $3,200 check was patterned or modeled after the $25 check, then your duty is clear in the premises; you must acquit the defendant.

It is your duty, therefore, to thoroughly weigh all of the evidence in the case, with a view to determining whether or not the
559 testimony of Weiss and Schutzberger, if you find that they were accomplices of the defendant in the commission of the crime of forgery, is corroborated by other evidence in the case, so as to connect the defendant with the commission of the crime of either forging the instrument or uttering the forged instrument.

Gentlemen of the jury, it is your duty to carefully weigh the testimony of each and every witness called. You are the exclusive judges of all questions of fact. If you believe that any witness has wilfully perverted the truth in any material particular, you are authorized but not bound to disregard his entire testimony. It is within your power to accept or reject the testimony of any witness, in whole or in part, as either credible or incredible, as the case may be. The testimony of each witness must be fairly and impartially considered by you, and tested by a discriminating judgment, with a view to determining whether the witness has a motive or interest other than to speak the truth. It is also within your power to attach to the testimony of any witness whatever value you think it is entitled to, and you may draw upon your own experience and knowledge of human nature in estimating the value of a witness' testimony. In judging the quality of the testimony, you may take into consideration the demeanor, manner and bearing of the witness; his attitude, whether neutral, friendly or hostile towards the prosecution or the defense, and his capacity or opportunity for knowledge or observation of the event or occurrence to which he testifies. Whenever you can conscientiously reconcile conflicting testimony, it is your duty to do so, but where you find any conflict

of testimony that you cannot reconcile, do not hesitate to cast aside that which you deem exaggerated, colored, partial biased, incorrect or wilfully perverted.

560 In this case, gentlemen, it is your duty to honestly and fairly consider all the evidence. This man is entitled to a fair trial. In the eye of the law he stands at the bar of justice entitled to the same rights as though he were the greatest benefactor in the community, and the greatest benefactor in the community is entitled to no more rights than the humblest member of society. The law is blind to the individual on trial, and the law insists that every man who is arraigned at the bar of justice should have a fair and impartial trial. Do not go outside of the evidence in this case. If the evidence in your opinion beyond a reasonable doubt is sufficiently strong to convict this defendant, do not hesitate to so find. If you have a reasonable doubt as to the defendant's guilt, give him the benefit thereof, for he is entitled to that and to an acquittal. The defendant is presumed to be innocent until the contrary be proved. He is entitled to the benefit of every reasonable doubt arising from the evidence in the case. A reasonable doubt is not a guess, or a conjecture or a surmise. It is a doubt for which a reason can be given. It is such a doubt as reasonable men may entertain after a careful and honest review and consideration of the case. It must survive the test of reasoning, and the mental processes of a reasonable examination. If there be a reasonable doubt in this case as to the defendant's guilt, he is entitled to an acquittal. If there be none, then you should convict him of the crime of forgery in the second degree as a second offence, and if not guilty, it is your duty to acquit him.

I have received the following request: I ask your Honor to charge the jury that the pardon of the President of the United States granted to the defendant herein, of the crime of selling and having in possession counterfeit money of the United States,

561 of which the defendant was convicted, and which is charged in the indictment herein as the first offence, reached the punishment prescribed therein and blotted out of existence the guilt of the defendant, so that in the eye of the law the defendant now is as innocent as if he had never committed the offence, charged in the indictment herein as the first offence, and that the said pardon removed all the penalties and disabilities attaching upon such conviction and restored the defendant to all his civil rights, and that the jury, therefore, cannot consider such conviction as and for the first offence herein.

Some of the things stated in your request, Mr. Levy, should have been subdivided.

Mr. LEVY: I follow the language there, your Honor, in this case I had.

The COURT: For instance, I shall charge the jury, so far as the pardon is concerned, that the defendant is entitled to all his civil rights under that pardon.

Mr. LEVY: Yes, sir.

The COURT: And that because of the pardon the jury are not to

consider the second offense—I decline to charge that and give you the benefit of an exception.

Your verdict, gentlemen, will be guilty of forgery in the second degree as a second offense, or guilty of forgery in the second degree as a first offense, or not guilty.

Mr. LEVY: Now, may it please your Honor, I wish your Honor would charge the jury with regard to the burden of proof and the right of the defendant to take the witness stand or not in his behalf, as he pleases.

The COURT: Yes, gentlemen of the jury, the law so jealously guards the rights of a defendant, that when he remains
562 silent, the Court has no right to refer to such fact until his counsel directs the Court's attention to such matter. Therefore, I have refrained from referring to the fact of the failure of the defendant to take the witness stand. Under our law a person charged with crime has a right to decline to take the witness stand in his own behalf, and the jury is forbidden to draw any unfavorable inference because of the failure of the defendant to give testimony. He has a right to fold his arms and say unto the People, "Prove my guilt beyond a reasonable doubt," and you have no right to permit his failure to take the stand to militate against him in the slightest degree; this injunction must be observed by you, gentlemen. These principles are basic in the criminal law. Any other requests?

Mr. LEVY: Yes, if your Honor please. Some testimony was admitted by your Honor over objection with regard to the non-appearance of the witnesses Rosotti and Rosenberg. I wish your Honor would explain to the jury the purpose of that.

The COURT: Yes, gentlemen, you have no right to consider on account of the absence of Rosotti and Rosenberg, that if they were called they would have given unfavorable testimony as to the defendant. I simply permitted the People to offer evidence on that branch of the case for the purpose of bringing the matter to your attention, so that the District Attorney could not be charged with failure to make every effort to produce all the witnesses in the case. It is simply part of the history of the case, accounting for the District Attorney's failure to secure the presence of those witnesses.

Mr. LEVY: May I tax your patience a moment longer? I would like your Honor to charge this jury that the mere possession by this defendant of the $25 check, Exhibit 1, of itself does not
563 establish any guilt or guilty knowledge on the part of the defendant.

The COURT: I so charge, but the jury may take all of the evidence into consideration.

Mr. LEVY: Yes, and one other matter, if your Honor please, I ask our Honor to charge the jury that the jury cannot convict this defendant on a guess or a surmise.

The COURT: Yes.

Mr. LEVY: Or upon conjecture, but their verdict must be based on the evidence in the case only.

The COURT: I so charge.

Now, if the jury desires to take with them any exhibit, it will have to be done by consent, gentlemen.

Mr. EDWARDS: The District Attorney consents to their taking anything in the case they wish.

Mr. LEVY: Why, they can take anything they ask for.

The COURT: Yes, well then, whatever you desire, gentlemen, you may take with you.

The FOREMAN: May we have all the exhibits?

Mr. LEVY: Yes, take them all.

Your Honor, may I note my exception to your refusal to charge as I requested?

The COURT: Yes.

The jury retired at 3:12 o'clock p. m., and returned to the court room at 3:35 o'clock p. m., and rendered the following verdict: We find the defendant guilty of forgery in the second degree as a second offense.

The COURT: Any motions, Mr. Brande?

Mr. BRANDE: Not at this time. Your Honor, will you put this over for one week, reserving the defendant's rights to make any motions at that time.

The COURT: Yes, one week. We will adjourn the January, 1912, Part III Term, for one week.

564 *Certificate of Clerk.*

CITY AND COUNTY OF NEW YORK, *ss:*

I, Edward R. Carroll, Clerk of the Court of General Sessions of the Peace, in and for the County of New York, do hereby certify that I have compared the preceding notice of appeal and judgment roll, including a copy of the minutes of the trial of the case of the People of the State of New York against Charles Carlesi, who was convicted in said Court on the 9th day of February, 1912, with the originals on file in my office, and that the same are correct transcripts therefrom and of the whole of such originals.

Given under my hand and attested by the seal of said Court this 25 day of Nov. in the year of our Lord one thousand nine hundred and twelve.

EDWARD R. CARROLL, *Clerk.*

Order Filing Record in Appellate Division.

Pursuant to Section 1353 of the Code of Civil Procedure, it is

Ordered that the within record be filed in the office of the Clerk of the Appellate Division of the Supreme Court in the First Judicial Department.

Dated, New York, Nov. 25, 1912.

JOSEPH F. MULQUEEN,
Judge of the Court of General Sessions of the Peace, N. Y. Co., in the Absence of Hon. Otto A. Rosalsky, the Judge Presiding at the Trial Herein.

565 *Notice of Appeal.*

Supreme Court, Appellate Division, First Judicial Department.

PEOPLE OF THE STATE OF NEW YORK, Respondent,
v.
CHARLES CARLESI, Defendant-Appellant.

GENTLEMEN: Please take notice that the above-named defendant, Charles Carlesi, hereby appeals to the Court of Appeals of the State of New York from a judgment and order of the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department thereof, duly filed in the office of the Clerk of the Appellate Division of our said Supreme Court on the 3rd day of January, 1913, and a certified copy whereof was duly remitted to and filed in the office of the Clerk of the Court of General Sessions of the Peace, in and for the County of New York on the 6th day of January, 1913, and whereby it was ordered and adjudged that the judgment entered in the office of the Clerk of the Court of General Sessions of the Peace, in and for the County of New York, on the 23rd day of February, 1912, be in all things affirmed, and the said defendant hereby appeals from each
566 and every part of said judgment and order, as well as from the whole thereof.

Dated, New York, January 6, 1913.

Yours, &c.,

BRANDE & WEBER,
Attorneys for Defendant-Appellant.

Office and P. O. Address, No. 346 Broadway, City of New York.

To Hon. Charles S. Whitman, District Attorney of the County of New York; Edward R. Carroll, Esq., Clerk of the Court of General Sessions of the Peace, in and for the County of New York.

567 *Order and Judgment of Affirmance.*

At a Term of the Appellate Division of the Supreme Court, Held in and for the First Judicial Department in the County of New York, on the 3rd Day of January, 1913.

Present:

Hon. George L. Ingraham, Presiding Justice.
" Chester B. McLaughlin,
" Frank C. Laughlin,
" Nathan L. Miller,
" Victor J. Dowling,

Justices.

3697.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
vs.
CHARLES CARLESI, Appellant.

Order of Affirmance on Appeal from Judgment.

An appeal having been taken to this Court by the defendant from a judgment of the Court of General Sessions of the Peace, rendered on the 23d day of February, 1912, and the said appeal having been argued by Mr. George Gordon Battle, of counsel for the appellant, and by Mr. Robert S. Johnstone, of counsel for the respondent, and due deliberation having been had thereon, it is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

Enter,

568 *Opinion of the Appellate Division.*

Supreme Court, Appellate Division, First Department, December, 1912.

George L. Ingraham, P. J.
Chester B. McLaughlin,
Frank C. Laughlin,
Nathan L. Miller,
Victor J. Dowling,
JJ.

No. 3697.

THE PEOPLE OF THE STATE OF — YORK, Respondent,
vs.
CHARLES CARLESI, Appellant.

Appeal by defendant from a judgment of conviction of the crime of forgery in the second degree as a second offense rendered against him in the Court of General Sessions, and by which judgment he was sentenced to imprisonment for the term of twelve years and eleven months.

George Gordon Battle, for Appellant.
Robert S. Johnstone, for Respondent.

MILLER, *J.*:

The defendant was indicted as a second offender for the crime of forgery in the second degree (Section 887 of the Penal Law), and uttering a forged instrument id., Section 881). The jury found

him guilty "of forgery in the second degree as a second offense."

This appeal is from the judgment of conviction by which he
569 was sentenced to imprisonment in a State Prison for the term of twelve years and eleven months.

It was proved that on or about June 15th, 1907, the defendant got possession of a genuine check of the Fiss, Doerr & Carroll Horse Company by cashing it for the holder, that he procured facsimile lithographed blanks to be made, filled in one of the blanks for $3,200, and caused it to be deposited in a bank by a third party and the proceeds to be drawn out. The signature on the forged check was traced from that on the genuine check, which remained in the defendant's possession until July 17th, 1907. The forged check was made and uttered on July 9th. While the evidence consisted principally of the testimony of accomplices, that testimony was strongly corroborated by the fact, which was established by independent evidence, of the possession by the defendant of the genuine check which was on a special lithographed form and of which the forged check was a facsimile, except for date, amount and name of the payee. That fact tended directly to connect the defendant with the commission of the offense, and the proof of it did not depend upon expert testimony as is asserted by the appellant, even if that could make any difference. Even if it was error to submit the second count of the indictment to the jury, which we are far from deciding, it was cured by the verdict.

The appellant urges, however, that he was improperly convicted as a second offender. The indictment charged that the defendant was convicted on the 20th day of December, 1892, at a Circuit Court of the United States of America, for the Southern District of New York, of the crime of selling and having in his possession counterfeit silver dollars upon an indictment which charged that the
570 defendant and others "did unlawfully and feloniously, and with intent to defraud some person unknown, sell, utter and publish a certain falsely made, forged and counterfeited coin, in resemblance and similitude of the silver coin of the United States, called and known as the standard silver dollar, * * * and within the jurisdiction of the Court last aforesaid, feloniously and with intent to defraud some person unknown did have in their possession a certain falsely made, forged and counterfeited coin, in resemblance and similitude of the silver coin of the United States, called and known as the standard silver dollar, * * * well knowing the same to be false, forged and counterfeited," and that he was sentenced by said Court to be imprisoned in the Monroe County Penitentiary for the term of three and one-half years, and to pay a fine of $1. The defendant conceded the previous conviction as alleged in the indictment and put in evidence a pardon granted to him on October 3rd, 1904, which recited the fact of his indictment, his conviction on a plea of guilty, his sentence, that he had served his term of imprisonment and, after earning all allowances for good conduct, was discharged on September 10th, 1898, and had since conducted himself in an exemplary manner, and concluded as follows:

"Now, therefore, be it known, that I, Theodore Roosevelt, Presi-

dent of the United States of America, in consideration of the premises, and divers other good and sufficient reasons, me thereunto moving,

Do hereby grant unto the said Charles Carlesi a pardon and restore his civil rights."

Of course, the principal, if not the sole, purpose of the pardon in this case was to restore to the convict his civil rights. We prefer, however, to put our decision on the broad ground that the
571 first conviction may, notwithstanding the offense be pardoned, be the basis for a conviction under Section 1941 of the Penal Law, which provides:

"A person, who, after being convicted within the state, of a felony, or an attempt to commit a felony, or of petit larceny, or, under the laws of any other state, government, or country, of a crime which, if committed within this State, would be a felony, commits any crime, within this State, is punishable upon conviction of such second offense, as follows: * * *"

The appellant urges two propositions, 1,—that the first offense as defined by Section 5457 of the United States Revised Statutes was not a felony as defined by the laws of this State (Sections 881 and 894 of the Penal Law), and that, therefore, the defendant could not be convicted as a second offender per force of said Section 1941; and 2,—that the prior conviction could not after a pardon be the basis of a conviction of a subsequent crime as a second offense.

Said Section 5457 of the United States Revised Statutes provides:

"Every person who falsely makes, forges, or counterfeits, or causes or procures to be falsely made, forged or counterfeited, or willingly aids or assists in falsely making, forging or counterfeiting any coin or bars in resemblance or similitude of the gold or silver coins or bars which have been, or hereafter may be, coined or stamped at the mints and assay-offices of the United States, or in resemblance or similitude of any foreign gold or silver coin which by law is, or hereafter may be, current in the United States, or are in actual use and circulation as money within the United States, or who passes, utters, publishes or sells, or attempts to pass, utter, publish or sell,
572 or bring into the United States from any foreign place, knowing the same to be false, forged, or counterfeit, with intent to defraud any body politic or corporate, or any other person or persons whatsoever, or has in his possession any such false, forged or counterfeited coin or bars, knowing the same to be false, forged, or counterfeited, with intent to defraud any body, politic or corporate, or any other person or persons whatsoever, shall be punished by a fine of not more than five thousand dollars, and by imprisonment at hard labor not more than ten years."

Section 881 of the Penal Law of this State provides:

"A person who, knowing the same to be forged or altered, and with intent to defraud, utters, offers, disposes of or puts off as true, or has in his possession, with intent so to utter, offer, dispose of, or put off:

1. * * *
2. A forged coin; or,
3. * * *

Is guilty of forgery in the same degree as if he had forged the same."

Section 894 *id.*, provides:

"A person who has in his possession a counterfeit of any gold or silver coin, whether of the United States or of any foreign country or government, knowing the same to be counterfeited, with intent to sell, utter, use, circulate or export the same, as true or as false, or to cause the same to be so uttered or passed, is punishable by imprisonment not more than five years, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment."

The argument is that there is a distinction between pos-
573 session with intent to defraud and possession with intent to utter. That distinction is too nice, and in any event, the first conviction was of "selling and having in possession."

The second proposition is based on the following language of Mr. Justice Field, speaking for the majority of the United States Supreme Court in ex parte Garland (4 Wall., 333), viz:

"A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities, consequent upon conviction, from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."

The appellant cites many cases in which that language has been quoted or referred to with approval, one case in which the precise proposition contended for by him seems to have been decided (Edwards v. Commonwealth, 78 Va., 39), and Bishop on Criminal Law (Vol. 1, Sec. 919), wherein the author takes the view that a second offense, the first one having been pardoned, is not a second but a first offense.

The precise point does not seem to have been decided in this State and, so far as the research of counsel goes, has been decided in only two states, the Supreme Court of Appeals of Virginia in Edwards v. Commonwealth, supra, taking the appellant's view, and the Court of Appeals of Kentucky, holding to the contrary (Mount v. Comm., 63 Ky., 93; Herdon v. Comm., 105 Ky., 197). The case near-
574 est in point in this State is People v. Price (53 Hun., 185, affirmed on the Opinion below, 119 N. Y., 650). But the appellant seeks to distinguish that case by the fact that the pardon for the first offense was granted by the Governor of the State of Georgia, and that the decision was put upon the ground that the Legislature of the State of New York was not controlled by the Constitution or laws of the State of Georgia. While that point was made by Mr. Justice Landon, writing for the General Term, his opinion, which was adopted by the Court of Appeals, put the decision on a much broader ground, namely, that the conviction was not obliterated by the pardon but remained as a fact in the past history of the defendant and that the punishment for the second offense was solely for

that and not at all for the offense committed in Georgia; and, necessarily, the latter proposition is correct, else all the statutes providing for increased punishment for second offenses would be unconstitutional (see Peo. ex rel. Cosgriff v. Craig, 195 N. Y., 190).

Manifestly, the language of Mr. Justice Field, quoted supra, is to be read in its bearing upon the precise point before the Court. The pardon of this defendant did not "make a new man" of him, it did not "blot out" the fact or the record of his conviction, and of course, the Supreme Court, in deciding that the Congress could not infringe upon the pardoning power of the executive did not intend to hold that the executive could blot out a solemn record of the judicial branch of government. (See Roberts v. State of New York, 30 App. Div., 106, 160 N. Y., 217.) The pardon in this case merely restored the defendant to his civil rights. If it had been granted before his term of imprisonment had been served, it would also have
575 relieved the defendant of that. But it did not obliterate the record of his conviction or blot out the fact that he had been convicted (Matter of —— an Attorney, 86 N. Y., 563). It relieved the defendant of the consequences which the law attached to his offense. But the defendant is to be punished now solely in consequence of his second offense. The fact of the former conviction is an element merely in determining the criminality of the second offense (Peo. v. Sickles, 26 App. Div., 470, 156 N. Y., 541; Peo. ex rel. Cosgriff v. Craig, supra). The Legislature of this State has said that one who commits a crime, after having been convicted of another crime, is a greater offender than as though he had not previously been convicted, and the punishment inflicted solely for the second offense to which a greater degree of criminality is thus attached. That degree of criminality is not at all lessened by the fact of a pardon which assumes his guilt, remits the punishment and affords him an opportunity to become a law-abiding citizen. It was solely within the province of the Legislature to attach such greater criminality to the second offense from the mere fact of a conviction for a first, and the executive by the exercise of the pardoning power could no more interfere with that exercise of legislative power than the Legislature could interfere with the power to pardon.

The judgment of conviction should be affirmed.

Ingraham, P. J., McLaughlin and Dowling, JJ., concur.

576 Supreme Court, Appellate Division, First Department, December, 1912.

George L. Ingraham, P. J.; Chester B. McLaughlin, Frank C. Laughlin, Nathan L. Miller, Victor J. Dowling, JJ.

No. 3697.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v.
CHARLES CARLESI, Appellant.

LAUGHLIN, J. (concurring):

I am of opinion that if the defendant had received a full unlimited pardon for the former offense it would have constituted an invulnerable shield against a subsequent conviction for a felony as a "second offense" pursuant to the provisions of Section 1941 of the Penal Law, which requires a longer sentence in such cases; because that statute presupposes not merely a former formal conviction, which may have been vacated or reversed, but which stands unaffected, whereas such a pardon obliterates guilt and is equivalent to a verdict of not guilty (Bishop's New Criminal Law, Vol. 1, §919; Edwards v. Commonwealth 78 Va., 39; Ex parte Hunt, 10 Ark., 284; People ex rel. Forsyth v. Court of General Sessions, 144 N. Y., 288, 295; Knote v. U. S., 95 U. S., 149; Ex parte A. H. Gar-
577 land, 4 Wall, 380; Osborne v. U. S., 91 U. S., 478; U. S v. Klein, 13 Wall., 128); but the pardon proved by the defendant was granted after he completely served his sentence and is expressly limited to restoring his citizenship, and therefore, the conviction remains unaffected.

Certification.

I, Edward R. Carroll, Clerk of the Court of General Sessions of the Peace, in and for the County of New York, do hereby certify that the foregoing is a copy of the notice of appeal, and of the judgment roll, in the case of the People ofthe State of New York against Charles Carlesi, now on file in the office of the Clerk of the Court of General Sessions of the Peace in and for the County of New York, and of the order of the Appellate Division of the Supreme Court, First Judicial Department, affirming said judgment, and the notice of appeal to the Court of Appeals from the said order of affirmance, and that the same has been compared by me with the originals and are correct transcripts therefrom and of the whole of said originals.

Given under my hand and attested by the seal of said Court this 15th day of January, 1913.

[SEAL.] EDWARD R. CARROLL,
Clerk of the Court of General Sessions of the Peace in and for the County of New York.

578 I, Edward R. Carroll, Clerk of the Court of General Sessions of the Peace of the County of New York, held in and for the County of New York, do hereby certify that the annexed is a copy of the Remittitur from the Court of Appeals of the State of New York in the case of The People, etc. against Charles Carlesi, alias Charles Carlese now on file in the Clerk's Office, and that the same has been compared by me with the original, and is a correct transcript therefrom and of the whole of such original.

Given under my hand and attested by the seal of the said Court this 5th day of June in the year of our Lord one thousand nine hundred and thirteen.

[SEAL.] EDWARD R. CARROLL.

579 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, Held at the Capitol, in the City of Albany, on the 4th Day of April, in the Year of Our Lord One Thousand Nine Hundred and Thirteen, Before the Judges of said Court.

Witness the Hon. Edgar M. Cullen, Chief Judge, presiding.

R. M. BARBER, *Clerk.*

Remittitur. April 5th, 1912.

580 THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
ag'st
CHARLES CARLESI, alias CHARLES CARLESE, Appellant.

Be it remembered that on the 12th day of February, in the year of our Lord one thousand nine hundred and thirteen, Charles Carlesi, alias Charles Carlese, the appellant in this action, came into the Court of Appeals, by Brande and Weber, his attorneys, and filed in the said Court a notice of appeal and return thereto from the judgment of the Appellate Division, First Judicial Department, affirming a judgment of conviction of the Court of General Sessions of the Peace, in and for the County of New York.

And the People of the State of New York, the respondent in this action, afterwards appeared in said Court of Appeals, by Charles S. Whitman, District Attorney.

Which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. George Gordon Battle, of counsel for the appellant, and by Mr. Robert S. Johnstone, of counsel for the respond-
581 dent, and after due deliberation had thereon, did order and adjudge that the judgment of conviction of the Court of General Sessions of the Peace, in and for the County of New York,

be and is hereby in all things affirmed on the opinion of Miller, J., below.

And it is also further ordered that the record aforesaid, and the proceedings thereon in this Court, be remitted to the said Court of General Sessions.

Therefore it is considered that the said original judgment of conviction be and is hereby in all things affirmed, as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the notice of appeal and return hereto aforesaid, as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Court of General Sessions of the Peace, in and for the County of New York, before the Judges thereof, according to the form of the statute in such case made and provided.

B. M. BARBER,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *April 5th*, 1913.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein attached thereto.

[SEAL.] B. M. BARBER, *Clerk.*

582 At a Term of the Court of General Sessions of the Peace in and for the County of New York, Held at the Criminal Court Building, in the City of New York, Borough of Manhattan, on the 7th Day of April, in the Year of Our Lord One Thousand Nine Hundred and Thirteen.

Present: Hon. Otto A. Rosalsky, Judge.

THE PEOPLE OF THE STATE OF NEW YORK, Respondents,
against
CHARLES CARLESI alias CHARLES CARLESE, Appellant.

Order on Remittitur.

Whereas, heretofore, to wit: at a term of the Court of General Sessions of the Peace in and for the County of New York, held at the Criminal Court Building, in the Borough of Manhattan of the said City, on the 26th day of January, 1912, the above-named appellant was in due form of law convicted by the verdict of a jury of a felony, to wit:

Forgery in the Second Degree as a second offense whereupon, to wit, on the 23rd day of February then next ensuing, it was considered by the said Court and ordered and adjudged, that the said appellant, for the felony aforesaid, whereof he was convicted as aforesaid, be imprisoned in the State Prison at hard labor for the term of twelve years and eleven months,

And Whereas, the appellant aforesaid, thereafter duly appealed from the said judgment to the Appellate Division of the Supreme Court of the State of New York for the First Department.

And Whereas, at a Term of the Appellate Division of the said Supreme Court, held in and for the First Department, to wit: at the Court House thereof in the County aforesaid, on the 3rd day of January in the year of our Lord one thousand nine hundred and thirteen the said judgment of this Court was by the judgment of the said Appellate Division in all things affirmed.

And Whereas, the appellant aforesaid thereafter duly appealed from the judgment of the said Appellate Division to the Court of Appeals of the State of New York.

583 And Whereas, at a term of the said Court of Appeals, held at the Capitol in the City of Albany, on the 4th day of April, in the year of our Lord one thousand nine hundred and thirteen, the said judgment of the said Appellate Division was by the judgment of the said Court of Appeals in all things affirmed, and the record herein, and the proceedings in the said last-mentioned Court upon the said appeal, were by the said judgment remitted to this Court, there to be proceeded upon according to law, as by the remittitur of the said Court of Appeals now on file in this Court, more fully appears.

Now, Therefore, on reading and filing the said remittitur, and on motion of Charles S. Whitman, Esquire, District Attorney, it is

Ordered, that the said judgment of the said Court of Appeals be and the same hereby is made the judgment of this Court, and it is further

Ordered, that the said judgment of this Court so appealed from as aforesaid and so affirmed, and the said judgment of the Appellate Division of the Supreme Court herein, be and the same are hereby directed to be enforced and carried into execution and effect.

Enter.

O. A. R.,
Judge of the Court of General Sessions.

584 [Endorsed:] Court of General Sessions. The People, Respondents, against Charles Carlesi, alias Charles Carlese, Appellant. Order on Remittitur. Charles S. Whitman, District Attorney, Attorney for Respondents, Criminal Courts Building, Borough of Manhattan, New York City.

[Endorsed:] U. S. Supreme Court. The People of the State of New York against Charles Carlesi, alias Charles Carlese. Return to Writ of Error.

585 To the Honorable the Justices of the Supreme Court of the United States:

The return of the Judges of the Court of General Sessions in and for the City and County of New York, to the Writ of Error issued out of the Supreme Court of the United States on the twenty-third

day of June, in the year one thousand nine hundred and thirteen, as follows:

1. The original Writ of Error.
2. The original petition for Writ of Error.
3. The original Assignment of Errors.
4. The original Bond on Writ of Error.
5. The original citation.
6. A true copy of the Remittitur from the Court of Appeals of the State of New York, now on file in the office of the Clerk of the said Court of General Sessions, containing a copy of the opinion of Mr. Justice Miller, of the Appellate Division of the Supreme Court of the State of New York, upon which the judgment was affirmed by the said Court of Appeals.
6. The original order of the Court of General Sessions on said Remittitur.

And we certify, under the seal of our said Court, to the Honorable, the Justices of the Supreme Court of the United States, the annexed record and proceedings had in the criminal prosecution by The People of the State of New York against Charles Carlesi, alias Charles Carlese.

Dated at New York City, August 6th, 1913.

By the Court.

EDWARD R. CARROLL,
Clerk of the Court of General Sessions in and for the City and County of New York.

[SEAL.]

586 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of General Sessions of the Peace in and for the County of New York, State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of General Sessions of the Peace upon a remittitur from the Court of Appeals of the State of New York before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of New York, plaintiff, and Charles Carlesi, alias Charles Carlese, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or
587 commission held under the United States, and the decision was against the title, right, privilege, or exemption specially

set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant, Charles Carlesi, alias Charles Carlese, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 23d day of June, in the year of our Lord one thousand nine hundred and thirteen.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

588 In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK
against
CHARLES CARLESI, alias CHARLES CARLESE, Defendant.

Petition for Writ of Error.

To the Supreme Court of the United States:

The petition of Charles Carlesi, the defendant in the above entitled action and the plaintiff in error herein, respectfully shows that on the 29th day of November, 1911, the Grand Jury of the County of New York filed an indictment charging the said defendant with the crime of forgery in the second degree as a second offense, in that the said Charles Carlesi had been previously convicted on the 20th day of December, 1895, before the Hon. Addison Brown, a judge of the Circuit Court of the United States of America for the Southern District of New York in the Second Circuit, of the crime of selling and having in his possession counterfeit silver dollars, against the form of the statute in such case made and provided.

That prior to the finding of the indictment charging the defendant with the crime of forgery in the second degree as a second offense by the Grand Jury of the County of New York, the said defendant Charles Carlesi, your petitioner herein, was pardoned by Theodore

Roosevelt, then the President of the United States of America, on the 3rd day of October, 1904, the said pardon being directed to the crime upon which the indictment found by the Grand Jury
589 of the County of New York predicated the subsequent offense as a second offense. In other words, after the defendant had been pardoned by the President of the United States, the Grand Jury of the County of New York used the offense for which the said defendant had been pardoned as a basis for indicting the said defendant as a second offender.

That the conviction of the defendant as a second offender brought to the crime an added punishment. In fact, it was only by virtue of the existence of a first offense that the indictment as for the second offense might stand and could be found under the precedents and adjudications of the Court of Appeals of the State of New York.

That upon the trial of your petitioner, the said defendant Charles Carlesi, in the Court of General Sessions of the Peace in and for the County of New York, duly commenced on the 26th day of January, 1912; before the Hon. Otto A. Rosalsky, a judge of the said court, and a jury, which trial was upon the indictment found as aforesaid by the Grand Jury of the County of New York, the defendant's counsel, Mr. Abraham Levy, of the New York Bar, interposed various objections to the indictment, and moved that the court strike from the indictment as found by the Grand Jury of the County of New York the allegations therein set forth which charged the defendant as having committed a second offense, the said motion being on the ground that that offense, if committed, had been entirely wiped out and obliterated and nullified by the action of the President of the United States, who, in granting to the defendant as aforesaid a full pardon for the offense with which he was charged in the Federal court, thereby removed from the defendant the disabilities and stigma of such conviction, and upon the ground that such
590 pardon under the decisions of the United States Supreme Court precluded the offense for which he had been pardoned from being the basis of his indictment as a second offender, and that said indictment was found in violation of Article 2, Section 2, of the Constitution of the United States, which provided for, as interpreted by the United States Supreme Court, the unlimited and uncontrolled power of pardon being vested in the President of the United States, as indicated in the Matter of Garland, 4 Wallace, at page 380, wherein the United States Supreme Court stated, as was quoted by defendant's counsel, the said Abraham Levy, as preliminary to the trial of the indictment and upon the motion above described,—

"This power of the President is not subject to legislative control * * * The pardon reaches both all punishment prescribed for the offense, and the guilt of the offender, and when the pardon is full it releases the punishment and blots out the existence of guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense * * * If granted after conviction it removes the penalties and disabilities and restores him to all his civil rights; it makes, as it were, a new man of him and gives him new credit and capacity."

That thereafter the defendant was convicted of the crime of forgery in the second degree, as a second offense, upon the indictment found as aforesaid by the Grand Jury of the County of New York; but prior to the submission of the said case to the jury the court's attention was again directed to the pardon and the effect of the pardon, and a motion was made to dismiss the indictment, in view of the pardon, which motion was denied. To all of the foregoing motions, due exceptions were taken, by defendant's counsel, and after conviction defendant obtained a certificate of reasonable doubt from a Judge of the Supreme Court, pending an
591 appeal to the Appellate Division of the Supreme Court of the State of New York, the ground for the issuance of the said certificate being that the justice issuing it felt that there was a reasonable doubt as to whether or not the conviction would stand, in view of Article 2, Section 2, of the Constitution of the United States, which conferred such broad powers upon the President, and the decision in the Garland case supra. The Appellate Division, however, affirmed the conviction, and an opinion was written by Mr. Justice Miller of that court, concurred in by Justices Ingraham, McLoughlin and Dowling, and an additional opinion was written by Mr. Justice Loughlin of the said court, in both which opinions the court recognizes that the question involved is one of the right of the defendant to be absolved of all guilt in connection with his first offense pardoned by the President and all penalties and disabilities attached by the commission of the first offense. The Appellate Division opinion cited and discussed the language of the United States Supreme Court in ex parte Garland supra, and said that the proposition contended for by the District Attorney representing the people of the State of New York was necessarily correct, "else all the statutes providing for increased punishment for second offenses would be unconstitutional." So that the Appellate Division recognized the fact that the question of the constitutionality of the conviction had been squarely raised and in its opinion takes cognizance thereof. Upon the affirmance by the Appellate Division of the Supreme Court as aforesaid, an application was made to the Judge of the Court of Appeals for a certificate of reasonable
592 doubt, which application, after careful deliberation, was granted by Judge Werner of the Court of Appeals upon the ground that there was sufficient doubt in the court's mind, in view of the fact that the defendant had been pardoned by the President, as to whether that pardon did not so completely wipe out the first offense as to preclude an indictment as for a second offense.

However, the Court of Appeals affirmed the judgment of conviction and the order of the Appellate Division upon the opinion of Mr. Justice Miller, as aforesaid. A copy of said order of affirmance was duly entered, as provided by statute, duly remitted, and your petitioner therefore states that in the said Court of Appeals, as well as in the various courts below, there is brought in question the defendant's rights under Article 2, Section 2, of the Constitution of the United States, on the ground that the indictment found against the defendant was repugnant to the Constitution of the United States, and the judgment of conviction was contrary to the

Constitution of the United States in that the pardon of the President, as aforesaid, precluded and prevented the indictment of the defendant as a second offender; and now, feeling aggrieved by the said orders and judgments hereinbefore recited, and by the rendition thereof, and by the proceedings had upon the trial herein, comes George Gordon Battle, the attorney for the defendant, and petitions for a writ of error to the Court of General Sessions of the peace held in and for the County of New York, commanding that court to send a record of the proceedings in the said criminal prosecution and all things concerning the same, to the
593 Justices of the Supreme Court of the United States, and for the usual citation, to the end that the record of the proceedings being inspected, the said Justices of the Supreme Court of the United States may cause further to be done therein, so as to correct all errors which of right and according to law and to the Constitution of the United States, ought to be done, and your petitioner also prays for such other orders and process as may be proper, and that an order may be made staying the execution of the judgment of conviction herein until the determination of the said appeal to this Supreme Court of the United States, and for such other and further relief as may be just and proper in the premises, and your petitioner will ever pray.

Dated, May 1st, 1913.

CHARLES CARLISI, *Petitioner.*
GEO. GORDON BATTLE,
Attorney for Petitioner.

STATE OF NEW YORK,
County of Westchester, ss:

Charles Carlesi, alias Charles Carlese, being duly sworn, deposes and says: That he is the defendant in the above entitled action and the plaintiff in error herein; that he has read the foregoing petition for writ of error and knows the contents thereof, and that the same are true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes them to be tru

CHARLES CARLISI.

Sworn to before me this 1st day of April, 1913.
D. J. HICKEY,
Notary Public, County of Westchester, N. Y.

594 In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK
against
CHARLES CARLESI, alias CHARLES CARLESE, Defendant.

Assignment of Errors.

Comes now Charles Carlesi, the plaintiff in error and the defendant below, and says that in the record of proceedings and final

judgments of the Court of Appeals of the State of New York and of the Supreme Court of the State of New York, and of the Court of General Sessions of the Peace held in and for the county of New York, in the above entitled criminal prosecution, manifest error was committed in this:

First. That in violation of Article 2, Section 2, of the Constitution of the United States, a Grand Jury of the County of New York filed an indictment against the said Charles Carlesi, charging him with the commission of a crime as a second offense, whereas the said Charles Carlesi had been duly pardoned by the President of the United States prior to the filing of the said indictment and the finding thereof, the said pardon being directed to the offense upon which the indictment for a second offense was predicated.

Second. That in violation of Article 2, Section 2, of the Constitution of the United States, the judge presiding at the trial of the said Charles Carlesi as a second offender in the Court of General Sessions of the Peace in and for the County of New York,
595 refused, though a motion was duly made for that purpose, to strike from the indictment above mentioned the allegations charging the said Charles Carlesi with being a second offender, although the said Carlesi, as above described, had been pardoned by the President of the United States for the offense upon which the indictment charging him as a second offender was predicated.

Third. That in violation of Article 2, Section 2, of the Constitution of the United States, the said trial judge of the Court of General Sessions of the Peace held in and for the County of New York, over defendant's objection and exception and proper motion made, allowed and permitted the attorney for the People of the State of New York to introduce in evidence testimony proving that the said Charles Carlesi had been convicted of a first offense, to wit, an offense prior thereto for which he had been pardoned by the President of the United States, and that the introduction of such testimony and of proof prejudiced the said Charles Carlesi, militated against him, and resulted in his conviction as a second offender, which conviction carried with it added penalties.

Fourth. That, in violation of Article 2, Section 2, of the Constitution of the United States, the said trial judge of the Court of General Sessions of the Peace held in and for the County of New York, denied a motion made by said Charles Carlesi's counsel in arrest of said judgment of conviction as a second offender, and due exception was taken by said counsel, inasmuch as the pardon of the President of the United States had obliterated and wiped out any disabilities attached to the commission of the offense upon which the judgment as a second offender was predicated.

596 Fifth. That, in violation of Article 2, Section 2, of the Constitution of the United States, the Appellate Division of the Supreme Court of the State of New York held in and for the First Department, sustained the judgment of conviction found by the jury in the said Court of General Sessions of the Peace held in and for the County of New York, though the said Appellate

Division well knew that the said Charles Carlesi had been pardoned by the President of the United States for the first offense upon which the indictment as a second offender was predicated, and though the said pardon completely obliterated and wiped out the said offense and precluded the possibility of any disability attached to the commission of the said offense by said Charles Carlesi.

Sixth. That, in violation of Article 2, Section, 2, of the Constitution of the United States, the Court of Appeals of the State of New York, the highest court in the said State and a court of last resort in the said State, affirmed the order of affirmance of the Appellate Division, as aforesaid, and the judgment of conviction as aforesaid, though the said Court of Appeals well knew that the said Carlesi had been pardoned by the President of the United States for the first offense, upon which the indictment as a second offender was predicated, and that the said pardon completely wiped out and nullified the commission of the first offense and precluded any disability or penalty from attaching to the said Carlesi by reason of the commission of the first offense, as the Supreme Court of the United States decided and interpreted the said Article 2, Section 2, of the Constitution of the United States.

597 Wherefore, the said Charles Carlesi, plaintiff in error herein and defendant in the court below, prays that the orders and the judgments above referred to be reversed, and that the Court of General Sessions of the Peace held in and for the County of New York be directed to grant a new trial to the said Charles Carlesi in the above-entitled case, and that the indictment against the said Charles Carlesi be amended and modified so as to contain no reference to the commission of a first offense on the part of the said Charles Carlesi, and that the defendant and plaintiff in error have such other, further and additional relief as may be proper in the premises.

GEO. GORDON BATTLE,
Attorney for Plaintiff in Error.

Office and post office address, 37 Wall street, Borough of Manhattan City of New York.

BRANDE & WEBER,
Of Counsel, 346 *Broadway,*
Borough of Manhattan, City of New York.

Allowed, Bond in $500, June 21, 1913.

CHARLES E. HUGHES,
Associate Justice U. S. Supreme Court.

598 [Endorsed:] United States Supreme Court. People of the State of New York against Charles Carlesi, alias Charles Carlese, Defendant. Petition and Assignment of Errors. Brande & Weber, Attorneys for defendant, 346 Broadway, Manhattan, New York.

599 Supreme Court of the United States of America.

THE PEOPLE OF THE STATE OF NEW YORK
against
CHARLES CARLESI, alias CHARLES CARLESE.

Know all men by there presents that we, Charles Carlesi, as principal, and Carlo Taibbi, as surety, are held and firmly bound unto the People of the State of New York, plaintiff above named, in the sum of Five Hundred dollars, to be paid to the said People of the State of New York, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our, and each of our, successors, representatives and assigns, firmly by these presents.

Sealed with our seals, and dated July 1st, 1913.

Whereas the above named defendant, Charles Carlesi, alias Charles Carlese, has sued out a Writ of Error to the United States Supreme Court, to reverse the judgment in the above entitled cause, by the Court of General Sessions of the Peace, in and for the County of New York,

Now, therefore, the condition of this obligation is such that if the above named Charles Carlesi, alias Charles Carlese, shall
600 prosecute said writ to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

CHARLES CARLESI, [L. S.]
Principal.
CARLO TAIBBI, *Surety.* [L. S.]

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Carlo Taibbi being duly sworn deposes and says that he is the above named surety described in and who executed the foregoing bond; that he is a freeholder in the State of New York, and is worth the sum of Five Thousand dollars, over and above all debts and liabilities incurred by him, and exclusive of property exempt by law from levy and sale on execution.

C. TAIBBI.

Sworn to before me this 1st day of July, 1913.

D. A. AURELIO,
Comm. of Deeds, #26, *City of New York.*

601 UNITED STATES OF AMERICA,
Southern District of New York, ss:

On this 1st day of July, 1913, before me personally appeared Carlo Taibbi, to me known and known to me to be the individual described in and who executed the foregoing bond, and declared it to be his voluntary act and deed.

D. A. AURELIO,
Comm. of Deeds, #26, *City of New York.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

On this 1st day of July, 1913, before me personally appeared Charles Carlesi, to me known and known to me to be the individual described in and who executed the foregoing bond, and declared it to be his voluntary act and deed.

[Seal George S. Jenkins, Notary Public, Westchester County, New York.]

GEORGE S. JENKINS,
Notary Public.

The foregoing bond is hereby approved.
Lake Placid, New York, July 10th, 1913.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

602 [Endorsed:] Supreme Court of the United States of America. People of the State of New York, Plaintiff, against Charles Carlesi, alias Charles Carlese, Defendant. (Orig.) Bond. Brande & Weber, Attorneys for Defendants, 346 Broadway, Borough of Manhattan, New York City.

603 & 604 UNITED STATES OF AMERICA, *ss:*

To the People of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of General Sessions of the Peace in and for the County of New York, State of New York, wherein Charles Carlesi, alias Charles Carlese, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States, this 23d day of June, in the year of our Lord one thousand nine hundred and thirteen.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

[Stamp:] District Attorney's Office. Received 1.30 P. M. July 21, 1913.

ANDREW FAY,
Acting Chief Clerk.

1/21/13.

605 Supreme Court of the United States.

CHARLES CARLESI, Plaintiff in Error,
against
PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

Stipulation.

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto that the fol-owing parts of the case on appeal in the Courts of Appeals in the case entitled "People of the State of New York, Respondent, v. Charles Carlesi, alias Charles Carlese, Defendant Appellant," shall be printed for use on the hearing in the Supreme Court of the United States, and that no other parts of the said case on appeal shall be printed for such use, to wit: folios 1 to 135 inclusive, beginning with the words "Court of General Sessions of the peace" on page 1, and ending with the words "Your Honor will please give me an exception" on page 45, and folios 1619 to 1731 inclusive, beginning with the words "New York, February 9, 1912," on page 540 of the case on appeal, and ending with the words "Clerk of the Court of General Sessions of the Peace, in and for the County of New York," on page 577 of the case on appeal.

It is further stipulated and agreed, by and between the attorneys for the respective parties hereto, that in addition to the matter hereinbefore designated the record to be printed for use on the hearing in the Supreme Court of the United States shall include the following papers or documents, together with such other papers as the Clerk of the Supreme Court of the United States shall deem proper

606 to insert or include in the said record, to wit:

(*a*) Remittitur from Clerk of the Court of Appeals.
(*b*) Notice of filing remittitur, etc.
(*c*) Order of remittitur.
(*d*) Judgment on remittitur.
(*e*) Petition for writ of error.
(*f*) Assignment of errors.
(*g*) Bond on writ of error.
(*h*) Citation.
(*i*) Writ of error.
(*j*) Clerk's certificate.

Dated, New York, N. Y., January 26th, 1914.

GEO. GORDON BATTLE,
Attorney for Plaintiff in Error.
CHARLES S. WHITMAN,
Attorney for Defendant in Error.

607 [Endorsed:] 679/23,830. United States Supreme Court. Charles Carlesi, Plaintiff in Error, vs. People of the State of New York, Defendant in Error. Stipulation. O'Gorman, Battle & Vandiver, Attorneys for Pl'ff in error 37 Wall St., New York City.

608 [Endorsed:] File No. 23,830. Supreme Court U. S., October term, 1913. Term No. 679. Charles Carlesi, alias Charles Carlese, Pl'ff in Error, vs. The People of the State of New York. Stipulation as to printing record. Filed January 28, 1914.

Endorsed on cover: File No. 23,830. New York Court of General Sessions of the Peace, County of New York. Term No. 679. Charles Carlesi, alias Charles Carlese, plaintiff in error, vs. The People of the State of New York. Filed August 9th, 1913. File No. 23,830.

Office Supreme Court, U. S.
FILED
JAN 3 1914
JAMES D. MAHER
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1913.

CHARLES CARLESI
alias
CHARLES CARLESE,
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defendant-in-Error.

No. 679.

Memorandum concurring in Motion to advance.

The defendant-in-error, while taking issue with the contention of the plaintiff-in-error that any federal questions are involved in this appeal, concurs in the motion to advance this cause, and respectfully urges that it be set down for a hearing at the earliest day consistent with the convenience of the Court, on the following grounds, namely:

That the plaintiff-in-error is confined in the State Prison of the State of New York under the judgment of conviction rendered against him, by which he was sentenced to a longer term by reason of the fact that he was convicted of the crime of forgery in the second degree "as a second offense". If the conviction had been for forgery in the first degree, not charged as a second offense, the maximum penalty could not exceed ten years and the plaintiff-in-error would have been entitled to the benefits of the indeterminate sentence law of the State of New York.

Respectfully submitted,

CHARLES S. WHITMAN,
District Attorney,
New York County.

No. 678.

IN THE

Supreme Court of the United States.

October Term, 1916.

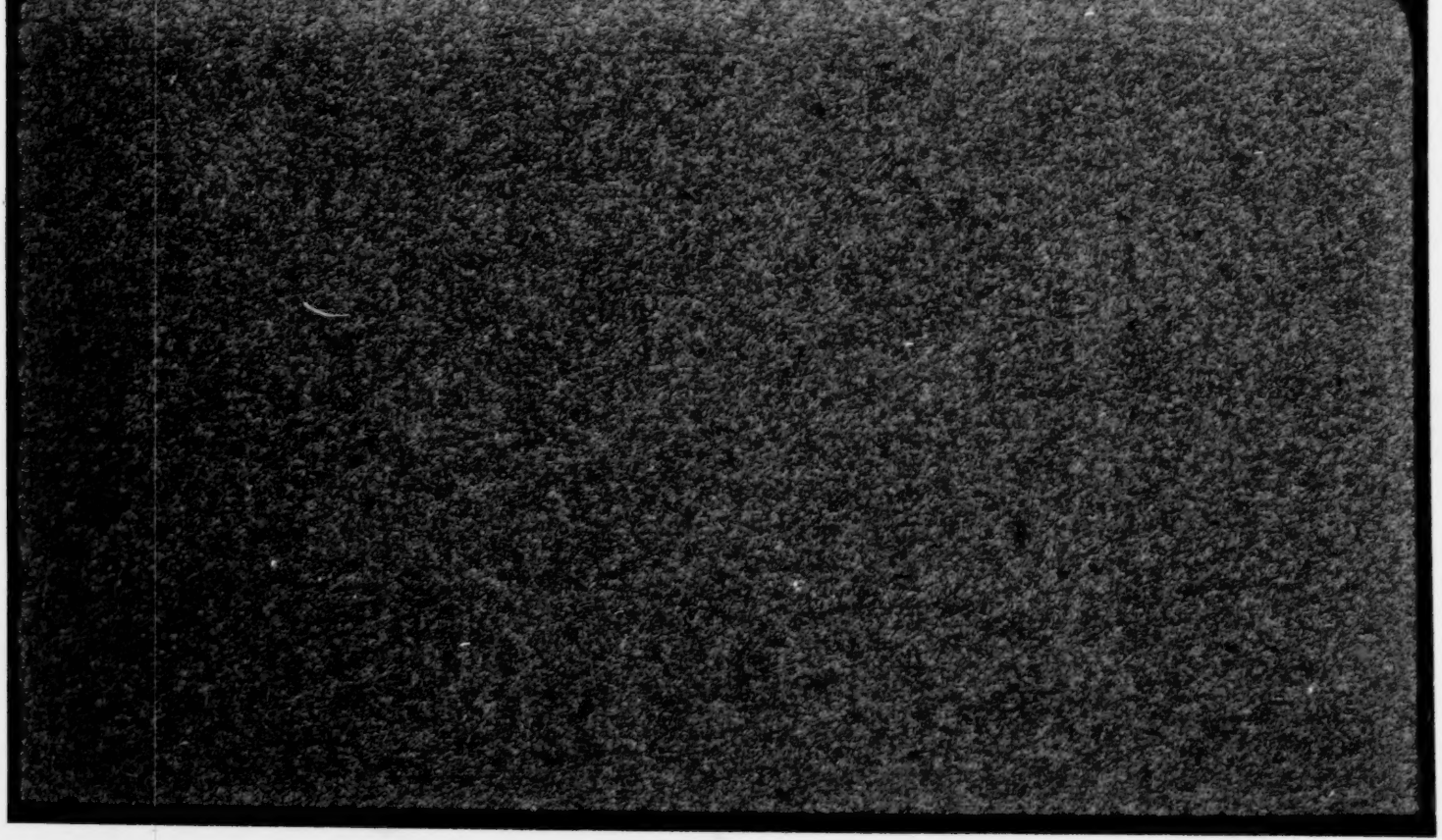
CHARLES CARELLI, *alias* CHARLES CARUSO,
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defendant-in-Error.

GEORGE GORDON BATTLE,
Counsel for Plaintiff-in-Error.

John B. Daughton (1914), Printer, Washington, D. C.



Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 679.

CHARLES CARLESI, *alias* CHARLES CARLESE,
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defendant-in-Error.

Now comes Charles Carlesi, alias Charles Carlese, plaintiff-in-error, and moves that upon the annexed petition and the transcript of the record in the above-entitled cause sent to this Court from the Court of General Sessions of the Peace in and for the County of New York in the State of New York, this cause be advanced for a hearing before this Court and assigned for argument on the earliest day convenient to the Court during the present term.



Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 679.

CHARLES CARLESI, *alias* CHARLES CARLESE,
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defendant-in-Error.

SIR: You will please take notice that the foregoing motion will be presented to the Supreme Court of the United States at a Session thereof appointed to be held at the Capitol in the City of Washington, on the 5th day of January, 1914, at the opening of Court on that day, or as soon thereafter as counsel can be heard.

Dated, New York, December 20th, 1913.

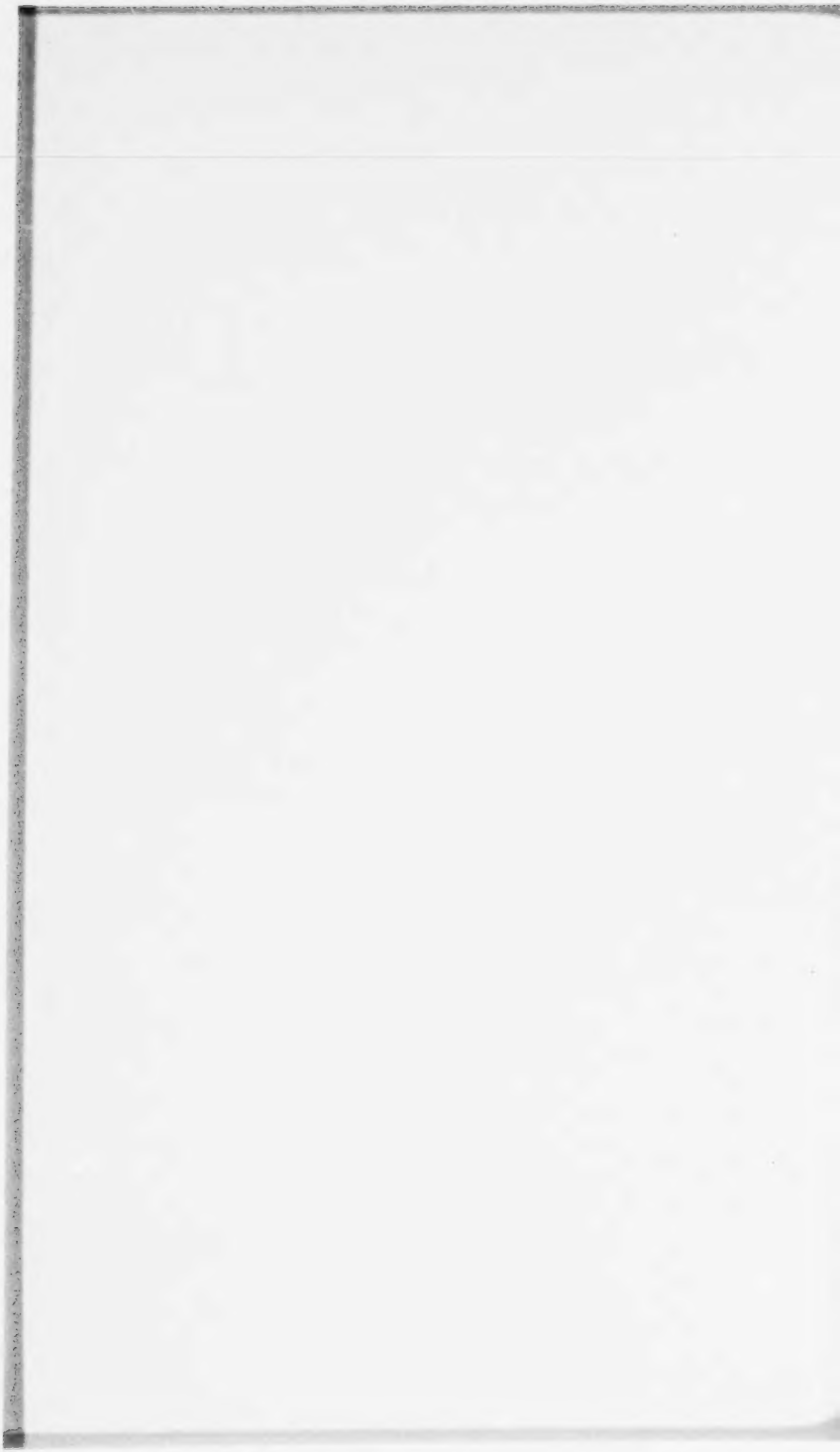
Yours, etc.,

GEORGE GORDON BATTLE,
Attorney and Counsel for Plaintiff-in-Error.

Office and Post-Office Address, 37 Wall Street, Borough of Manhattan, New York City.

To Hon. CHARLES S. WHITMAN,
District Attorney of the County of New York,
Attorney for Defendant-in-Error.

Franklin and Center Streets, Borough of Manhattan, New York City.



Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 679.

CHARLES CARLESI, *alias* CHARLES CARLESE,
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defendant-in-Error.

Motion to Advance.

The plaintiff-in-error moves the Court to advance this case and to assign it for argument on the earliest day convenient to the Court during present term, for the following reasons:

1. That on the 29th day of November, 1911, at the Court of General Sessions of the Peace, in and for the County of New York, a true bill of indictment was found by the Grand Jury of the County of New York, charging in one count the plaintiff-in-error, Charles Carlesi, with the crime of forgery

in the second degree, as a second offense, in that after conviction at a Circuit Court of the United States of America, for the Southern District of New York, held at the Federal Building in the Borough of Manhattan, County and State of New York, on December 20, 1895, of the crime of selling and having in his possession counterfeit silver dollars [U. S. Rev. St., Sec. 5457], the said Charles Carlesi on the 9th day of July, 1907, did feloniously forge a certain negotiable instrument therein set out, and in the second count of the said indictment, charging said Charles Carlesi with the commission of the crime of forgery in the second degree as a second offense, in that having been convicted by the Circuit Court of the United States aforesaid, on July 9, 1907, the said Charles Carlesi feloniously did utter the instrument aforesaid.

2. That the plaintiff-in-error Charles Carlesi was thereafter arrested in the State of New York on a warrant issued under the said indictment and on the 5th day of December, 1911, was arraigned to plead thereto, and did on the said date plead "not guilty" thereto and demanded a trial thereon.

3. That on the 26th day of January, 1912, and thereafter in due course a trial was had upon the said indictment in the Court of General Sessions of the Peace, of the City and County of New York, Part III thereof, before the Hon. Otto A. Rosalsky, a Judge of that Court, and a jury. This trial resulted in a verdict of guilty against plaintiff-in-error.

4. Thereafter, on February 23, 1912, the judgment of the Court was pronounced by the Judge aforesaid, sentencing plaintiff-in-error to imprisonment in the State Prison at hard labor, for the term of twelve years and eleven months.

5. Pursuant to such judgment, the plaintiff-in-error has been since the said date, in actual custody under the said judgment and sentence, and is now imprisoned in one of the State Prisons of the State of New York, situated in Auburn, New York.

6. At the beginning of the trial of plaintiff-in-error, and before a jury was impaneled, and after one talesman had been called and sworn, counsel for the plaintiff-in-error brought to the attention of the Trial Judge a pardon granted by the Hon. Theodore Roosevelt, President of the United States, on or about the 3rd day of October, 1904, to the said Charles Carlesi, which was as follows:

> "*Theodore Roosevelt, President of the United States of America, to all to whom these presents shall come, Greeting:*
>
> "WHEREAS, Charles Carlesi was indicted in the United States Circuit Court for the Southern District of New York for selling and having in possession counterfeit silver dollars in violation of Section 5457 of the Revised Statutes of the United States, pleaded guilty, and on January third, 1896, was sentenced to imprisonment for three and one-half years in the Monroe County Penitentiary, at Rochester, New York, and to pay a fine of one dollar; and,
>
> "WHEREAS, he served his term of impris-

onment, and after earning all allowances for good conduct was discharged September tenth, 1898, and since his discharge has conducted himself in an exemplary manner.

"NOW, THEREFORE, be it known, that I, Theodore Roosevelt, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant unto the said Charles Carlesi a pardon to restore his civil rights.

"IN TESTIMONY WHEREOF, I have hereunto signed my name and caused the seal of the Department of Justice to be affixed.

"Done at the City of Washington this third day of October, in the year of our Lord one thousand nine hundred and four, and of the independence of the United States the one hundred and twenty-ninth.

"[Seal of Department of Justice.]

"T. ROOSEVELT.

"By the President:

"HENRY M. HOYT,

"Acting Attorney General."

This pardon was granted to plaintiff-in-error after he had served the sentence imposed upon him by the Circuit Court of the United States, and after his discharge from imprisonment on September 10, 1898.

7. After calling this pardon to the attention of the Trial Judge, the counsel for the plaintiff-in-error moved the Court to strike from the indictment every allegation therein contained relating to the conviction of the said Charles Carlesi of the

crime of having in his possession counterfeit silver dollars, and also requested the Court to direct and order that the case proceed against the plaintiff-in-error as a first offender. This motion was based upon the contention that the pardon of the President of the United States wiped out, destroyed and nullified the first offense of which the said Charles Carlesi had been convicted and imprisoned.

8. It was urged on behalf of plaintiff-in-error that the statutes of the State of New York, in no way permitted the prosecution of a defendant as a second offender where the defendant had been convicted under the Federal Law and afterward received the pardon of the Chief Executive, and also, that if such statute did authorize such prosecution, the same was void and in conflict with the Constitution and Laws of the United States. The Court denied the motion, to which due exception was taken.

9. The case proceeded to trial under the indictment charging the plaintiff-in-error with the commission of the crime of forgery as a second offender, and at the close of the People's case counsel for the plaintiff-in-error moved the Court to advise an acquittal on the ground, among others, of the insufficiency of the proof. This motion was denied. Counsel renewed his motion made at the beginning of the trial, to take from the consideration of the jury the question of the second offense. This motion was also denied, and thereafter the plaintiff-in-error was convicted.

10. Before judgment was pronounced, counsel for plaintiff-in-error moved for a new trial, urging error in the refusal of the Court to take from the jury's consideration the charge as a second offense. This motion was also denied and judgment was pronounced as aforesaid.

11. After the conviction by the Court of General Sessions, the plaintiff-in-error obtained a certificate of reasonable doubt from a justice of the Supreme Court of the State of New York, the ground for the issuance of the said certificate being that the Justice issuing it felt that there was reasonable doubt as to whether or not the conviction would stand in view of Article 2, Section 2 of the Constitution of the United States, and the decision of this Court in *ex parte* Garland, 4 Wall., 380.

12. Thereafter the plaintiff-in-error appealed to the Appellate Division of the State of New York, First Department, from the judgment of conviction, basing his appeal in part upon the exceptions hereinbefore referred to, and upon the argument of that appeal the contention of the plaintiff-in-error that his constitutional rights had been invaded by his conviction as a second offender, and that full force and effect had not been given to the pardon of the President, and that the same obliterated and destroyed the first offense whereof plaintiff-in-error was convicted, were urged upon that Court.

13. The Appellate Division of the Supreme Court, First Department, affirmed the judgment of

conviction. Mr. Associate Justice Laughlin concurring, said, in part:

> "I am of opinion that if the defendant had received a full, unlimited pardon for the former offense it would have constituted an invulnerable shield against a subsequent conviction for a felony as a 'second offense,' pursuant to the provisions of Section 1941 of the Penal Law, which requires a longer sentence in such case; because that statute presupposes not merely a former formal conviction, which may have been vacated or reversed, but which stands unaffected, whereas such a pardon, obliterates guilt and is equivalent to a verdict of not guilty * * *; but the pardon proved by the defendant was granted after he completely served his sentence and is expressly limited to restoring his citizenship and, therefore, the CONVICTION remains unaffected."

14. Upon the affirmance of the judgment of conviction by the Appellate Division of the Supreme Court, Application was made to a Judge of the Court of Appeals of the State of New York, which is the highest Court of law or equity in the said State of New York, for a certificate of reasonable doubt, which application was granted by the Hon. William E. Werner, one of the Associate Judges of that Court, upon the ground, among others, that there was sufficient doubt in his mind, in view of the fact that the plaintiff-in-error had been pardoned by the President of the United States, as to whether that pardon did not so completely wipe

out the first offense as to preclude an indictment for a second offense.

15. The appeal to the Court of Appeals came on to be heard in due course on January 3, 1913. The same questions hereinbefore referred to as having been raised at the trial in the Court of General Sessions, before the Special Term of the Supreme Court of the State of New York, before the Appellate Division of the said Court, and before the aforesaid Judge of the Court of Appeals, were presented to the full bench of the Court of Appeals.

16. On April 4, 1913, the Court of Appeals entered an order affirming the judgment of the Appellate Division, which had affirmed the judgment of the Court of General Sessions.

17. The Court of Appeals wrote no opinion but affirmed on the opinion of Mr. Justice Miller of the Appellate Division. The decision of the Court of Appeals is reported *sub nomine* People of the State of New York against Charles Carlesi, in 208 N. Y., 547, and the decision of the Appellate Division is reported *sub nomine* People of the State of New York against Charles Carlesi, in 154 App. Div., 481.

18. That on the 7th day of April, 1913, pursuant to the decision and order of affirmance of the Court of Appeals, final judgment was rendered against the plaintiff-in-error by the Court of General Sessions of the County of New York.

19. That on the 21st day of June, 1913, a writ of error to this Court, upon application of the

plaintiff-in-error, was allowed by Mr. Justice Hughes, and pursuant to said writ of error and the citation issued thereon, a return has been made by the Court of General Sessions of the County of New York to this Court, containing a record of the proceedings whereon said final judgment of conviction was rendered, and said return was filed in the office of the Clerk of this Court upon August 9th, 1913.

20. That the questions involved in this case, especially that relating to the force and effect to be accorded to the pardon of the President of the United States for the federal offense of which the plaintiff-in-error was convicted, involving, as that question does, the rights and privileges of this plaintiff-in-error under the Constitution of the United States, and more especially under Article I, Section 2, and Article XIV, Section 1 thereof, are questions which should be reviewed by this Court.

Conclusion.

Under the Penal Law of the State of New York (Section 888), forgery in the second degree is punishable by a term of imprisonment not exceeding ten years. This is the maximum term which MAY be imposed. The infliction of this term of imprisonment is not mandatory. Ten years is the maximum sentence.

Section 2189 of the Penal Law provides that:

> "A person never before convicted of a crime punishable by imprisonment in the State Prison, who is convicted in any Court of the State of New York of a felony other than murder, first and second degree, and sentenced to a State Prison, SHALL be sentenced thereto under an indeterminate sentence, the minimum of which shall not be less than one year, or in case a minimum is fixed by law, not less than such minimum; otherwise the minimum of such sentence shall not be more than one-half the longest term, and the maximum shall not be more than the longest term fixed by law for which the crime is punishable of which the offender is convicted."

Section 1941 of the Penal Law, however, provides that:

> "A person who, AFTER HAVING BEEN CONVICTED WITHIN THIS STATE of a felony, or, under the Laws of any other State, Government or country, of a crime which, if committed 'within this State' would be a felony, commits any crime within this State, MUST BE SENTENCED upon conviction of such second offense to imprisonment for a term not less than the longest term, nor more than twice the longest term prescribed upon a first conviction."

Plaintiff-in-error received a sentence of twelve years and eleven months. This was two years and eleven months more than he would have received as a first offender, if the maximum sentence prescribed by law had been imposed.

If convicted as a first offender the plaintiff-in-error would have been entitled to the benefit of the indeterminate sentence law referred to (*supra*, Section 2189 P. L., N. Y.), and would have been entitled also to the Court's clemency in suspending judgment if the Court was so moved to do. But, under the second offense provision of the statute (*supra*, Section 1941 P. L., N. Y.), it is MANDATORY upon the Court to impose a sentence of not less than the longest term which might have been imposed for a first offense.

If Section 2, of Article 2 of the Constitution of the United States, providing that the President may have power to grant reprieves and pardons for offenses against the United States, had been given full force and effect, as was the case in *ex parte* Garland, *supra*, and if Section 2 of Article XIV, providing, among other things, that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and that no State shall deprive any person of his liberty without due process of law, had been given full force and effect, plaintiff-in-error could not, under his conviction, have been sentenced to more than ten years' imprisonment and would have been entitled to the benefits of the Prison Law of the State of New York relating to first offenders (Prison Law, State of New York, Sections 212, 214, Laws 1899, Ch. 47, Art. 8).

WHEREFORE, plaintiff-in-error submits that the above facts are sufficient to show the necessity for

advancing this case for hearing at the earliest possible time, in order that, if the contentions of the plaintiff-in-error as to the violation of his constitutional rights are sustained, he may be relieved of the illegal consequences of his conviction, and in order that he may receive such other and further relief under the Constitution and Laws of the United States as may be fitting and proper in the premises.

All of which is respectfully submitted.

GEORGE GORDON BATTLE,
Counsel for Plaintiff-in-Error.

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No. 679.

FEB 25 1914
JAMES D. MAHER
CLERK

United States Supreme Court

CHARLES CARLESI, alias CHARLES CARLESE,

Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Defendant in Error.

Brief in Behalf of Plaintiff in Error.

GEORGE GORDON BATTLE,
Attorney for Plaintiff in Error,
No. 37 Wall Street,
Borough of Manhattan,
New York City.

ALMUTH C. VANDIVER,
JOHN CALDWELL MYERS,
JAMES E. BRANDE,
JOSEPH WEBER,
J. JOSEPH LILLY,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

CHARLES CARLESI, alias CHARLES CARLESE, Plaintiff in Error, *against* THE PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.	October Term, 1913, No. 670

Statement.

This case comes on to be heard in this Court by writ of error to review and reverse a judgment of the Court of General Sessions of the Peace in and for the County of New York convicting the plaintiff in error under an indictment charged him with the alleged crime of forgery in the second degree as a second offense, despite the pardon of the President of the United States for the first offense, prior to the trial of the indictment aforesaid.

Statement of Facts.

The plaintiff in error was convicted in the Court of General Sessions of the Peace in and for the County of New York of the alleged crime of forgery in the second degree as a second offense (fol. 3), and was sentenced to imprisonment in the State Prison for a term of twelve years and eleven months (fol. 4). He was tried before a judge of the said Court and a jury, and was sentenced on February 23, 1912 (fols. 3-4).

The first offense, as admitted upon the trial, was a conviction of the crime of selling, uttering and forging counterfeit coins. That conviction was had on December 20, 1895, in the United States Circuit Court for the Southern District of New York, and the plaintiff in error was sentenced upon a plea of guilty to the Monroe County Penitentiary for three and one-half years and to pay a fine of one dollar. He served the sentence, and was discharged September 10, 1898 (fols. 544-545). October 3, 1904, the plaintiff in error received a full pardon from President Roosevelt, reciting that the President of the United States did thereby "grant unto the said Charles Carlesi a pardon to restore his civil rights" (fol. 545).

At the very outset of the trial for forgery in the second degree as a second offense, plaintiff in error's counsel put the pardon in evidence and moved to strike out the allegations in the indictment setting forth any fact or matter relating to the first conviction. He also moved that the court make a direction and order that the case proceed against the plaintiff in error only as for a first offense (fols. 16-17). This motion was based upon the contention that

the pardon of the President wiped out, destroyed and nullified the first offense. It was claimed in support of the motion that the statutes of the State of New York in no way sought or purported to permit the prosecution for a second offense where the defendant had been convicted under the Federal Laws and afterwards fully pardoned by the President, and that such state statute if it permitted such prosecution was void as being in conflict with the Constitution and laws of the United States. The Court denied the motion, to which ruling due exception was taken (fol. 35).

The case proceeded to trial, and at the close of the People's case counsel for the plaintiff in error moved the Court to advise an acquittal on the ground that the People had failed to establish facts sufficient to sustain the indictment, upon the ground of the insufficiency of the proof and upon other grounds which it is unnecessary to set out here. This motion was denied, and an exception granted (fol. 540).

Counsel for the plaintiff in error then renewed his motion made at the beginning of the trial to take from the consideration of the jury the question of a second offense, the motion being based upon the ground stated at the beginning of the case. This motion was denied, and an exception taken, whereupon the defendant rested without calling any witnesses (fol. 541).

Counsel for the plaintiff in error then renewed his motion to advise the jury to acquit the defendant on the grounds stated at the close of the People's case, which motion was denied and an exception taken (fol. 543).

The Court charged the jury and the defendant was convicted.

State Court Proceedings to Review Conviction.

After the conviction in the Court of General Sessions of the Peace, the plaintiff in error obtained a certificate of reasonable doubt from a Justice of the Supreme Court of the State of New York pending an appeal to the Appellate Division of the Supreme Court of the State of New York, the ground for the issuance of the said certificate being that the Justice issuing it felt that there was reasonable doubt as to whether or not the conviction would stand in view of Article 2, Section 2, of the Constitution of the United States, which conferred such broad powers upon the President, and the decision in Ex parte Garland, 4 Wall., 380 (fol. 591).

Thereafter the plaintiff in error appealed to the Appellate Division of the Supreme Court, First Department, from the judgment of conviction, basing his appeal in part upon the exceptions hereinbefore referred to (fol. 2).

The Appellate Division of the Supreme Court, First Department, affirmed the judgment of conviction in the Court of General Sessions of the Peace, and in so doing held that a former conviction is an element merely in determining the criminality of the second offense, and that a pardon for the former offense does not obliterate the record or blot out the fact that the defendant has been convicted, and that therefore the plaintiff in error could be convicted as a second offender notwithstanding the fact that the President of the United States had pardoned him for the first offense (fol. 575). The decision of the Appellate Division is reported

sub nom. People v. Carlesi in 154 App. Div., 481.

The judgment of affirmance in the Appellate Division was unanimous, but Mr. Justice Laughlin, in a concurring opinion, said:

> "I am of opinion that if the defendant had received a full, unlimited pardon for the former offense it would have constituted an invulnerable shield against a subsequent conviction for a felony as a 'second offense,' pursuant to the provisions of Section 1941 of the Penal Law, which requires a longer sentence in such cases; because that statute presupposes not merely a former formal conviction, which may have been vacated or reversed, but which stands unaffected, whereas such a pardon obliterates guilt and is equivalent to a verdict of not guilty * * * ; but the pardon proved by the defendant was granted after he completely served his sentence and is expressly limited to restoring his citizenship and, therefore, the *conviction* remains unaffected."

After the affirmance by the Appellate Division of the Supreme Court, an application was made to a judge of the Court of Appeals of the State of New York for a certificate of reasonable doubt, which application, after careful deliberation, was granted by Judge Werner of that Court, upon the ground that there was sufficient doubt in his mind, in view of the fact that the plaintiff in error had been pardoned by the President of the United States, as to whether that pardon did not so completely wipe out the first offense so as to preclude an indictment for a second offense (fol. 592).

Affirmance by the State Court of Appeals.

The plaintiff in error, on January 3, 1913, appealed to the Court of Appeals of the State of New York, which is the Court of last resort in New York, from the order of the Appellate Division affirming the judgment of the Court of General Sessions (fol. 565).

In the Court of Appeals the plaintiff in error raised the same questions hereinbefore referred to as having been raised in the Court of Gneral Sessions and in the Appellate Division (fol. 592).

On the 4th day of April, 1913, the Court of Appeals entered an order affirming the judgment of the Appellate Division, which in turn affirmed the judgment of the Court of General Sessions (fol. 579). The Court of Appeals wrote no opinion, but affirmed on the opinion of Mr. Justice Miller in the Appellate Division (fol. 581). The decision in the Court of Appeals is reported sub nom People of the State of New York v. Charles Carlesi, in 208 N. Y., 547.

On May 1, 1913, the plaintiff in error filed in this Court his petition for a writ of error to the Court of General Sessions of the Peace held in and for the County of New York, to correct the errors committed during the trial (fol. 588), assigning the following errors as grounds for the issuance of the writ:

Specifications of Error.

"First: That in violation of Article 2, Section 2, of the Constitution of the United States, a Grand Jury of the County of New York filed an indictment against the said Charles Carlesi, charging him with the com-

mission of a crime as a second offense, whereas the said Charles Carlesi had been duly pardoned by the President of the United States prior to the filing of the said indictment and the finding thereof, the said pardon being directed to the offense upon which the indictment for a second offense was predicated.

"Section: That in violation of Article 2, Section 2, of the Constitution of the United States, the Judge presiding at the trial of the said Charles Carlesi as a second offender in the Court of General Sessions of the Peace in and for the County of New York, refused, though a motion was duly made for that purpose, to strike from the indictment above mentioned the allegations charging the said Charles Carlesi with being a second offender, although the said Carlesi, as above described, had been pardoned by the President of the United States for the offense upon which the indictment charging him as a second offender was predicated.

"Third: That in violation of Article 2, Section 2, of the Constitution of the United States, the said Trial Judge of the Court of General Sessions of the Peace, held in and for the County of New York, over defendant's objection and exception and proper motion made, allowed and permitted the attorney for the People of the State of New York to introduce in evidence testimony proving that the said Charles Carlesi had been convicted of the first offense, to wit, an offense prior thereto for which he had been pardoned by the President of the United States, and that the introduction of such testimony and of proof prejudiced the said Charles Carlesi, militated against him, and resulted in his conviction as a second offender, which conviction carried with it added penalties.

"Fourth: That, in violation of Article 2, Section 2, of the Constitution of the United

States, the said Trial Judge of the Court of General Sessions of the Peace held in and for the County of New York, denied a motion made by the said Charles Carlesi's counsel in arrest of said judgment of conviction as a second offender, and due exception was taken by said counsel, inasmuch as the pardon of the President of the United States had obliterated and wiped out any disabilities attached to the commission of the offense upon which the judgment as a second offender was predicated.

"Fifth: That, in violation of Article 2, Section 2, of the Constitution of the United States, the Appellate Division of the Supreme Court of the State of New York, held in and for the First Department, sustained the judgment of conviction found by the jury in the said Court of General Sessions of the Peace, held in and for the County of New York, though the said Appellate Division well knew that the said Charles Carlesi had been pardoned by the President of the United States for the first offense upon which the indictment as a second offender was predicated, and though the said pardon completely obliterated and wiped out the said offense and precluded the possibility of any disability attached to the commission of the said offense by said Charles Carlesi.

"Sixth: That, in violation of Article 2, Section 2, of the Constitution of the United States, the Court of Appeals of the State of New York, the highest Court in the said State and a Court of last resort in the said State, affirmed the order of affirmance of the Appellate Division, as aforesaid, and the judgment of conviction as aforesaid, though the said Court of Appeals well knew that the said Carlesi had been pardoned by the President of the United States for the first offense, upon which the indictment as a second offender was predicated, and that

the said pardon completely wiped out and nullified the commission of the first offense and precluded any disability of penalty from attaching to the said Carlesi by reason of the commission of the first offense, as the Supreme Court of the United States decided and interpreted the said Article 2, Section 2, of the Constitution of the United States" (fol. 594).

Writ of Error Allowed.

On the 23rd day of June, 1913, Mr. Justice Hughes allowed the writ and fixed the bond in the sum of $500 (fol. 586), which bond has been given by the plaintiff-respondent and filed in the office of the Clerk of the Supreme Court of the United States (fol. 599).

Question Involved and Manner in Which it was Raised.

The question submitted to this Court for determination is:

Can a person, who has been convicted in the Federal Courts of an offense against the Laws of the United States, and who has been pardoned by the President of the United States for such offense, after he has served the term of imprisonment to which he was sentenced therefor, and who has been restored to his civil rights by the President of the United States be, thereafter convicted and sentenced as a second offender under the Penal Laws of the State of New York, upon the trial of an indictment for an alleged offense against the Laws of that State, and if so convicted, is the judgment of conviction as a second offender rendered by the said Court, contrary to the provisions of the

Constitution of the United States, in that it disregards the pardon of the Chief Executive of the United States, granted under the authority vested in him by Article II, Section 2 of the Constitution of the United States, and in that it enforces a statute abridging the rights, privileges and immunities of a citizen of the United States in violation of Section One of Article XIV of the Constitution.

Federal Questions Raised in State Courts.

Counsel for plaintiff in error raised the federal question of the scope, extent and effect of the pardon of the Chief Executive of the United States, granted pursuant to the authority vested in him by Article II, Section 2 of the Constitution of the United States, during the trial of the plaintiff in error in the following manner:

At the beginning of the trial, upon the motion to strike from the indictment the allegation charging the defendant as for a second offense upon the ground that the first offense charged in said indictment, if committed, had been entirely wiped out and obliterated and nullified by the action of the President of the United States, who, in granting to the defendant a full pardon for the offense with which he was charged in the Federal Court, thereby removed from the plaintiff in error the disabilities and stigma of such first conviction (fol. 11).

During the course of the argument upon such motion, where the counsel for the plaintiff in error stated to the Court:

> "As a preliminary to my motion, I wish to state to Your Honor that the Constitution provides that the President shall have

> power to grant reprieves and pardons for all offenses against the United States excepting in cases of impeachment; that it is provided for in Article II, Section 2 of the Constitution of the United States—the unlimited, uncontrolled power of pardon."

By the statement of counsel for the plaintiff in error to the trial court during the course of the argument upon said motion:

> "The inquiry arises as to the effect and operation of a pardon. * * * The pardon reaches both the punishment prescribed for the offense and the guilt of the offender, and when the pardon is full it releases the punishment and blots out the existence of guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence" (fol. 19).

By Counsel for the plaintiff in error in his statement to the trial court where he said:

> "The point that I make is that this having been a Federal offence, or an offence against the laws of the Federal Government by this defendant, for which he was convicted, and that the President of the United States had pardoned that, under the decisions of the Courts of the United States that pardon obliterated all his guilt, so that in construing the law bearing upon this proposition the application of the principles of law must come, not from the State adjudication, but must come from the Federal adjudications, which declare the force and effect and operation and power of the Chief Executive's pardoning prerogative" (fol. 20).

During the course of the trial and on the People's case, where counsel for the plaintiff in error stated:

> "in order that there will be no misunderstanding about the matter, I desire to repeat that every admission and concession made before the impaneling of this jury with regard to the prior conviction of this defendant, his service in expiation of that offence, and his subsequent pardon, all the facts may be repeated upon the record, reaffirmed, and the defendant reserves unto himself, with Your Honor's permission, the same exceptions taken before" (fol. 42).

Upon the motion to advise the jury to acquit, made at the close of the People's case, it appearing in the record as follows:

> "The Court: The motion made by this learned counsel representing the defendant to dismiss the indictment and to advise the jury to acquit the defendant is denied, and an exception granted" (fol. 540).

On the motion to dismiss made at the end of the People's case, the following language:

> "The defendant rests, and in resting, if Your Honor please. let me say that I do it without calling witnesses out of a sense of duty, and in the honest belief in the merit of my application made to you yesterday to advise the jury to acquit" * * * (fol. 541).

During the course of the trial, where the counsel for the plaintiff in error stated to the Court:

> "If Your Honor please, so as to preserve the record, I deem it my duty at this time to renew the motion made at the beginning of the case, to take from the consideration of the jury the question of a second offence, upon the grounds stated then, if Your Honor please.
>
> "The Court: Yes, the motion is denied.

"Mr. Levy: An exception, if you please" (fol. 541).

At the close of the whole case, where the motion was made to dismiss the indictment and to advise the jury to acquit, the following language:

> "Now, if Your Honor please, I renew the motion made at the close of the People's case, under the provisions of Section 410 of the Code of Criminal Precedure, to advise the jury to acquit, and upon the grounds then stated.
>
> "The Court: Motion denied.
>
> "Mr. Levy: Exception, if you please" (fol. 543).

By the denial of the following request to charge:

> "I ask your Honor to charge the jury that the pardon of the President of the United States granted to the defendant herein, of the crime of selling and having in possession counterfeit money of the United States, of which the defendant was convicted, and which is charged in the indictment herein as the first offence, reached the punishment prescribed therein and blotted out of existence the guilt of the defendant, so that in the eye of the law the defendant now is as innocent as if he had never committed the offence, charged in the indictment herein as the first offence, and that the said pardon removed all the penalties and disabilities attaching upon such conviction and restored the defendant to all his civil rights, and that the jury, therefore, cannot consider such conviction as and for the first offence herein" (fol. 561).

Jurisdiction of this Court.

The Federal Questions arising under the Constitution and Laws of the United States were raised as aforesaid at the trial of plaintiff in error in the Court of General Sessions and were there passed upon adversely to plaintiff in error. These same questions, involving an interpretation of the full force and effect of the pardon of the President of the United States, were presented to the Appellate Division of the Supreme Court, on appeal by plaintiff in error, and were there passed on adversely to plaintiff in error as more particularly appears by the opinion of that court set out in the transcript of the record herein.

The Court of Appeals of the State of New York, which is the Court of last resort in that State, affirmed the judgment of conviction of plaintiff in error upon the opinion of the Appellate Division of the Supreme Court.

The Jurisdiction of this Court, therefore, to review the judgment of the Court of General Sessions of the Peace in and for the County of New York, is perfectly clear, the Federal questions involved having been raised at the outset of the trial in the Court of original jurisdiction by plaintiff in error, and having there and in the subsequent Appellate Courts been passed upon adversely to his contentions.

Brief of the Argument.

Article II, Section 2, of the Constitution of the United States contains the following provision:

> "The President * * * shall have power to grant reprieves and pardons for

offenses against the United States, except in cases of impeachment."

When the President of the United States, acting pursuant to the authority conferred upon him by this constitutional provision, grants a full pardon for an offense against the United States, the effect of the pardon is to blot out of existence the guilt of the offender, so that in the eye of the law he is as innocent as if he had never committed the offense.

This rule was laid down in Ex parte Garland, 4 Wall., 380, and the decision in that case has been followed repeatedly by this Court in other decisions which will be cited in succeeding portions of this brief. In Ex parte Garland, p. 381, the Court said:

> "The power thus conferred is limited, with the exception stated. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions. Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. The pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the

> penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities and restores him to all his civil rights; it makes him, as it were, a new man, and gives him new credit and capacity. There is only this limit to its operation; it does not restore offices forfeited or property or interests vested in others in consequence of the conviction and judgment."

It is clear, therefore, that if a person who has been pardoned by the President for an offense against the United States is subsequently indicted and sentenced as a second offender in a State court for an offense against the State laws, and is thereby subjected to the additional or increased punishment imposed by the statutes of the State upon second offenders, the conviction and sentence as a second offender is an enforcement of a State law, abridging the privileges and immunities vesting in him by virtue of the pardon granted by the President of the United States; and is in violation of Section One of Article XIV of the Constitution of the United States and in disregard of the pardon of the Chief Executive issued pursuant to Section 2 of Article II of the Constitution.

POINT I.

The New York State Court passed judgment upon plaintiff in error, after verdict of conviction of an alleged crime non-existent in New York; and the failure of the State Court to recognze and give full force and effect to the President's pardon, denied to plaintiff in error the privilege, immunity and liberty guaranteed to him by Section 1 of Article 14 of the Constitution of the United States.

Section 1 of Article 14 of the Constitution of the United States provides, among other things, as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its purisdiction the equal protection of the laws."

The plaintiff in error was convicted of the alleged crime of forgery in the second degree, as a second offense. (Transcript, f. 563.)

There is no such crime known to the Penal Law of the State of New York.

Forgery in the second degree is defined by Section 887 of the Penal Law of the State of New York, and the **punishment** therefor as prescribed in Section 888, is a term of imprisonment not exceeding ten years. This is the

maximum term which **may** be imposed. The infliction of this term of imprisonment is not mandatory. Ten years is the **maximum** sentence.

The indictment alleged the commission of the crime of "Forgery in the second degree as a second offense." The jury brought in a verdict of guilty of this crime which is unknown to the Penal Law of the State. The crime defined there is "forgery in the second degree."

The New York Second Offense Law relating to *judgment*, after conviction is as follows:

> "A person, who, after having been convicted within this State, of a felony, or attempt to commit a felony, or of petit larceny, or, under the laws of any other State, government, or country, of a crime which, if committed within this State, would be a felony, commits any crime, within this state, is **punishable** upon the commission of such second offense as follows:
>
> "1. If the subsequent crime is such that, upon a first conviction, the offender might be punished, in the discretion of the court, by imprisonment for life, he *must be sentenced to imprisonment* in a state prison for life.
>
> "2. If the subsequent crime is such that, upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life, then such person *must be sentenced to imprisonment* for a term not less than the longest term, nor more than twice the longest term, prescribed upon a first conviction" (Sec. 1941 P. L. State N. Y.).

Plaintiff-in-error was sentenced under his conviction of this non-existent crime to serve a term of imprisonment of twelve years and eleven months.

If the pardon granted to plaintiff-in-error by the President of the United States, in the language of Mr. Justice Field, writing in Ex parte Garland (supra) "reaches both the punishment prescribed for the offence and the guilt of the offender" and "releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is an innocent as if he had never committed the offence," plaintiff-in-error could not legally be sentenced as a second offender and would have been entitled upon conviction of the crime set out in the Penal Law, i. e., forgery in the second degree to the benefit of the indeterminate sentence law of the State of New York (Sec., 2189 of the Penal Law) which provides as follows:

> "A person never before convicted of a crime punishable by imprisonment in a State prison, who is convicted in any court in this State of a felony other than murder first or second degree, and sentenced to a State prison, shall be sentenced thereto under an indeterminate sentence, the minimum of which shall not be less than one year, or in case a minimum is fixed by law, not less than such minimum; otherwise, the minimum of such sentence shall not be more than one-half of the longest period and the maximum shall not be more than the longest period fixed by law for which the crime is punishable of which the offender is convicted. The maximum limit of such sentence shall be so fixed as to expire during either of the following months: April, May, June, July, August, September and October."

Plaintiff-in-error would also have been entitled to the Court's clemency in suspending judgment if the Court was so moved to do. It cannot be

urged that Section 2189 is not a substantial right, privilege and immunity from punishment for crime.

Nor, can it be successfully urged that plaintiff-in-error's conviction and sentence did not preclude him from the benefits arising out of the indeterminate sentence law, and the discretion of the Court as to suspending of the judgment.

These are privileges and immunities of the citizens of the State of New York and of the United States.

It cannot be successfully urged that the judicial officers of the State of New York did not enforce the second offense statute of the State of New York against plaintiff-in-error illegally and to his prejudice and with absolute disregard of the pardon of the Chief Executive of the United States and absolute disregard of the obliteration of the first offense committed by plaintiff-in-error and of his new credit and capacity arising under the pardon.

If Section 2, of Article 2 of the Constitution of the United States, providing that the President may have power to grant reprieves and pardons for offenses against the United States had been given full force and effect, as was the case in *ex parte* Garland, supra, and if Section One of Article XIV, providing, among other things, that no State shall make or enforce any law which shall abridge the privileges or immunities of citzens of the United States, and that no State shall deprive any person of his liberty without due process of law, had been given full force and effect, plaintiff-in-error could not, under a proper and legal conviction, have been sentenced to more than ten years' imprisonment and would have been entitled to the bene-

fits of the Prison Law of the State of New York relating to first offenders (Prison Law, State of New York, Sections 212, 214, Laws 1899, Ch.47, Art. 8).

The Appellate Courts of the States of Virgnia and Ohio, in well-considered opinions, have decided that a pardon obliterates the first offense to such an extent that conviction and punishment as a second offender may not be predicated thereon.

The Courts of the States of Kentucky and New York have adopted a contrary view, without advancing in their opinions convincing reasons why the logic of the Virginia and Ohio Judges should be disregarded. By reason of this inequality of judicial opinion it may not be amiss to call the attention of this Court to the determination of the Court of Cassation, the highest appellate tribunal of France, in a similar matter.

The case is cited in the argument of counsel for the petitioner in Ex Parte Garland (supra): One Clemency had been guilty of theft, in a time of great scarcity; and was amnestied. She afterwards committed the same offence, and the prosecution insisted on inflicting upon her the accumulated penalties due to a repetition of the offence. But the Court held that the first offence had been so completely annihilated by the amnesty that it could not be considered in law as having ever existed or been committed, insomuch that the offence for which she was then prosecuted, though in reality a repetition of the first, could be considered in law only as a first offense, and punished as such.

De Villeneuve & Carrette, Vol. 1825, 1827 Part 1, p. 135.

A pardon and amnesty are practically synonymous in the literature of our law. A pardon is usually granted to an individual, amnesty to a class of persons or to a whole community. (Ex. Parte Garland, supra.)

There can be no doubt as to the meaning of amnesty. It is derived from the Greek word *amnestia,* which means oblivion, the state or condition of being forgotten and no longer remembered (ex parte Garland, supra).

Doubtless Justice Field had this definition in mind when the Garland case was before this Court for determination.

During the years immediately succeeding the Civil War, Mr. Justice Field in several cases brought to this Court had occasion to construe the effect of Presidential pardons and proclamations of amnesty. His views on the effect of pardons by the Chief Executive, concurred in by the majority of the Court then sitting, have remained upon the books without challenge to the present day, excepting by the Courts of New York and Kentucky.

In the Garland case (supra) Justice Field decided that "the power of the President (to pardon) is not subject to legislative control and that Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders.

Let us assume that the Legislature of the State of New York had provided in the second offense statute under consideration (section 1941 supra) that a pardon by the President of the United States should not exempt the recipient thereof from the operation of the New York statute in regard to subsequent offenses. There can be no doubt that such a statue would be

squarely in contravention of the majority opinion of this court as announced by Justice Field in the above quotation to the effect that the legislative branch of the governmnet may not exclude from the benefits of the Presidential pardon any class of offenders. A statute somewhat similar to our illustration has been passed by the Legislature of the State of New York in which it is provided that after a first conviction of felony a person thereafter convicted may be adjudged an habitual criminal and that a pardon received by such an offender for the first offense is unavailing (Section 1022 Penal Law of the State of New York). The Courts of the State of New York in the case at bar have construed the second offense statute as though this same provision in the habitual criminal statute was also in the second offense statute. In the case at bar, the Courts of New York have treated the plaintiff-in-error as if no executive clemency had ever intervened between his original offense and the second charge upon which he was convicted. This is a judicial interference with the effect of the Chief Executive's power and authority unauthorized by the laws of the United States or the Constitution thereof and is in direct violation of the long line of judicial decisions of this Court as to the effect of a pardon by the President.

The Garland case was decided in 1866. A few years later Mr. Justice Field, in the case of Carlisle vs. The United States, 16 Wall., 147 had occasion to write as follows:

"There has been some difference of opinion among the members of the court as to cases covered by the Presidential pardon, but there has been none as to the effect and operation of the

pardon in the cases where it applies. All have agreed that the pardon (of the President) not merely releases the offender from the punishment prescribed for the offense, but that it obliterates in legal contemplation the offense itself."

And a few years later in the case of Knote vs. The United States, 95 U. S., 153, Mr. Justice Field made these further observations on the effect of a pardon:

"In contemplation of law it (the pardon) so far blots out the offense that afterward it cannot be imputed to him to prevent the assertion of his legal rights."

If plaintiff in error had been serving his sentence when the Presidential pardon was received by him, he would have enjoyed the right and privelege of immediate liberty and avoided the remaining years of his sentence. The plaintiff in error claims this same protection for the additional years of judgment illegally pronounced upon him by the New York trial court acting under the mandatory provisions of the second offense law, after conviction of an offense not set out in the statutes.

The failure of the New York State Trial Court and Appellate Courts to recognize the Presidential pardon and give due effect thereto operates to deprive plaintiff in error of his liberty without due process of law and deprives him of the privileges and immunities under Presidential pardon pursuant to the decisions of this Court as to the effect of such pardon. This Court has held through Mr. Justice Field in the cases cited supra, and in numerous others, that property rights, where no vested interest has intervened, will be restored to a convict after the receipt of

a Presidential pardon. Having so decided, does it not logically follow that this Court will protect and guarantee and conserve to plaintiff in error the years of his liberty of which he is deprived under the sentence of the said court, in accordance with the benefits of the Presidential pardon to which he is entitled? The Presidential pardon in this case was unavailing when presented to prevent the sentence imposed upon plaintiff in error. It has been held by this Court to be available to protect individuals in the enjoyment of the right to practice law before this Court, to enjoy immunity from further punishment, penalties and disqualifications, to enjoy restored rights of suffrage and credibility, and plaintiff in error earnestly submits that he also is entitled to immunity thereunder from prosecution as a second offender and from judgment under an improper conviction.

It was considered by the Appellate Division of the New York Supreme Court that this pardon was not free, full and unconditional.

The pardon was not conditional because no conditions were attached thereto, which must be performed by the recipient before the same became effective or which if not performed rendered the same ineffective. It expressed no limitation upon its face. The learned judges of the Appellate Courts of the State of New York erroneously read a limitation into the same due to the following language thereof:

> "Do hereby grant unto the said Charles Carlesi a pardon to restore his civil rights."

The New York Courts construed this inept and unscientific language to be the **effect** of the pardon. Plaintiff in error contends that it was but an expression of the **purpose** of the Chief Exec-

utive in granting the same. What other purpose could there have been for granting it? Plaintiff in error had served his term of imprisonment. The pardon therefore could not have been for the purpose of relieving him from further loss of liberty due to the sentence in that case, nor can it be seriously urged that the pardon was to relieve him of the obligation of paying the one dollar fine which was also a part of the judgment. What rights remain to be restored? His credibility as a witness and the right of suffrage, assuming that he was then a citizen. Can it be seriously contended that this pardon, accepting, for the purposes of this argument, the view that this was the purpose of the President, merely restored plaintiff in error's competency as a witness and his right to vote, and yet that he did not receive thereunder the further privilege, right and immunity of exemption from indictment as a second offender? For the purposes of the witness chair and the voting booth, plaintiff in error under this view was exempt from attack as a felon convict, but not immune from criminal prosecution as a second offender. It is respectfully submitted that this reasoning is unsound. The opinion of the New York State Appellate Court is as follows: The pardon "did not obliterate the *record* of his conviction or blot out the *fact* that he had ben convicted." This view is directly contrary to that of Mr. Justice Field in the cases cited supra to the effect that the *offense* was obliterated by a Presidential pardon. In the very next sentence of its opinion the New York Appellate Court states: "It relieved the defendant of the *consequences* which the law attached to his offense. The defendant is now to be punished solely in consequence of his second

offense." It hardly is open to argument that one of the consequences of a first felony, in the absence of executive clemency, is added punishment for subsequent crime.

The Court may impose this sentence when the previous conviction is called to the attention of the Court when judgment is passed. There is no statutory authority for pleading the previous conviction in the indictment, or proving the same on the trial, and its only effect, when pleaded and shown before the jury is to insure a conviction, in some degree, of the crime charged in the indictment. Consequently, when an individual, who after conviction of a felony, commits within the State of New York another felony, he commits no **greater crime** than one who has theretofore committed a misdemeanor or who has committed no crime. But the **punishment** prescribed for the felon offender who again violates the law is greater. The **degree** of the offense, however, is identical in each case instanced. A consideration of Section 1941 of the Penal Law of the State of New York—which is a direction of the court as to passing judgment—and not the specific definition of a new crime—bears out this view. The New York Appellate Court correctly says (page 575), but the defendant is to punished now solely in consequence of his second offense. The fact of the former conviction is an element merely in determining the criminality of the second offense." If the word "punishment" be substituted for the word 'criminality,' no fault can be found with this statement. Continuing the Appellate Court states:

> "The legislature of this state has said that one who commits a crime after having been convicted of any other crime is a

> greater offender than as though he had not previously been convicted, and the punishment inflicted solely for the second offense to which a greater degree of criminality is then attached. That degree of criminality is not at all lessened by the fact of a pardon which assumes his guilt, remits the punishment and affords him an opportunity to become a law-abiding citizen. It was solely within the province of the legislature to attach such greater criminality to the second offense from the mere fact of a conviction for a first, and the executive, by the exercise of the pardoning power, could no more interfere with that exercise of legislative power than the legislature could interfere with the power to pardon."

This view of the power of the legislature is directly at variance with the views of this court as expressed by Mr. Justice Field in the cases supra, and particularly in the case of Carlisle v. The United States supra, in which Mr. Justice Field stated that Congress might not exclude any class of citizens from the benefit of the Presidential pardon. This court has said that individuals receiving Presidential pardons have their offense obliterated and that they are relieved from further disabilities incident to conviction or wrongdoing. The legislature of the State of New York, according to the New York Appellate Courts, has excluded convicted felons from this operation of the Presidential pardon. If this view is correct, the obliteration of the guilt of the recipient of the Presidential pardon is a right, privilege and immunity which is thus evaded and disregarded by the legislature of the State of New York and by the Courts of this State, and is an exercise of arbitrary power in contravention and viola-

tion of Section 1 of Article XIV of the Constitution of the United States, which this Court will not countenance. Possibly the Legislature of the State of New York, by passing Section 1941 of the Penal Law did not intend that law to be an encroachment upon any of the prerogatives of the President and especially that benign prerogative of mercy which lies in the pardoning power. Perhaps it is mere reasonable to conclude that individuals in the possession and enjoyment of Presidential pardons were not in the contemplation of the legislature which passed the act in question and were not intended to be embraced by that statute, and were consequently exempt from the operations thereof and that the Courts of New York should have given that construction to the statute, in the case at bar. As Mr. Justice Field well said, in Carlisle v. United States, supra:

> "All general terms in statutes should be limited in their application so as not to lead to injustice, oppression or any unconstitutional operation if that be possible. It will be presumed that exceptions were intended which would avoid results of that nature."

This was a citation from U. S. v. Kirby, 7 Wall., 482.

Consequently, plaintiff in error herein urges upon this court the following contentions:

(1) The Presidential pardon obliterated the first offense of which he was convicted and his guilt thereof, and renderel him immune from any future consequences thereof and restored his credit and capacity and made of him a new man as if he had never been convicted.

(2) That the result of this pardon brought him before the bar of the State trial court as a first offender and not otherwise.

(3) That plaintiff in error was consequently exempt from the operation of the New York second offense statute providing, in mandatory terms, that upon a second conviction at least the maximum term for a first conviction should be imposed.

(4) That the Trial Court's disregard of the Presidential pardon was an enforcement of a statute depriving the plaintiff in error herein of the privileges and immunities inuring to his benefit by virtue of the Presidential pardon, and in contravention of Section I of Article XIV of the Constitution of the United States.

(5) That this action of the State Court was in disregard of the President's pardon issued to plaintiff in error herein by virtue of the authority vested in the President by Section 2 Article II of the Constitution of the United States.

(6) That plaintiff in error was convicted in violation of Section I of Article XIV of the Constitution of the United States of an offense which which is not defined and nowhere appears in the Penal Law of the State of New York or in the Code of Criminal Procedure thereof, and that such conviction and judgment is consequently void and illegal and plaintiff in error is now imprisoned and deprived of his liberty without due process of law.

(7) That the judgment of the Court pronounced upon plaintiff in error was unauthorized by the statutes of the State of New York

and in violation of the constitutional rights of plaintiff in error and especially of Section I of Article XIV and Section 2 of Article II of the Constitution of the United States.

POINT II.

The pardon of the plaintiff in error by the President of the United States obliterated the first offense, so that the plaintiff in error could not thereafter be prosecuted as a second offender.

> "A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime that he has committed."
>
> United States v. Wilson, 7 Peters 150, 159, per Marshall, C. J.

> "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction it removes the penalties and disabilities and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."
>
> Ex parte Garland, 4 Wall., 380, 381.

"An absolute pardon operates to prevent all further punishment for the offense for which it is given, to remove all penal consequences and disabilities incident to the conviction and to create in the pardoned offender a new credit and capacity, wholly unaffected by his crime."

24 Amer. & Eng. Ency. of Law, 2nd Edition, p.584.

The foregoing rule as laid down in the American and English Encyclopaelia of Law is supported by the following authorities:

Ex parte Garland, 4 Wall., 333;
United States v. Klein, 13 Wall., 147;
Carlisle v. United States, 16 Wall., 151;
In re Monroe, 46 Fed., 52;
United States v. Athens Armory, 35 Ga., 362; 2 Abb. (U. S.), 150; Fed. Case No. 14473;
People v. Pease, 3 Johns. Cases (N. Y.), 333;
Locklin v. State (Tex. Crim., 1903), 75 S. W., 305.

"It is of the very essence of a pardon that is releases the offender from the consequences of his offense."

Osborn v. United States, 91 U. S., 474, 477.

"It (a pardon) releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence that afterwards it cannot be imputed to him to prevent the assumption of his legal rights. It gives to him a new credit

and capacity, and rehabilitates him to that extent in his former position."

Knote v. United States, 95 U. S., 149, 153.

"When a full and absolute pardon is granted it exempts the individual upon whom it is bestowed from the punishment which the law inflicts for the crime which he has committed. The crime is forgotten and the individual is relieved from all its legal consequences. The effect of a full pardon is to make the offender a new man. It blots out of existence the guilt, so that in the eyes of the law the offender is as innocent as if he had never committed the offense."

29 Cyc., 1566, 1567; citing numerous cases.

"When a full and absolute pardon is granted, * * * it exempts the individual on whom it is bestowed from the punishment which the law inflicts upon the crime which he has committed. The crime is forgotten and the individual is relieved from all of its legal consequences."

Territory v. Richardson, 9 Okla., 579; 60 Pac., 244; 49 L. R. A., 440.

See also

Territory v. Richardson, 10 Okla., 17; 61 Pac., 1135.

"It (a pardon) is, in effect, a reversal of the judgment, a verdict of acquittal, and a judgment of discharged thereof, to this extent, that there is a complete estoppel of record against further punishment pursuant to such conviction."

Knapp v. Thomas, 39 Ohio State, 377, 381.

> "The general rule is that a pardon does away with the future consequences of the criminal act, as completely as if it had never been committed."
>
> Diehl v. Rogers, 169 Pa. State, 316, 319.

> "A full and absolute pardon releases the offender from the entire punishment prescribed for his offense, and from all the disabilities consequent upon his conviction."
>
> Fite v. State, 114 Tenn., 646, 656.

The decision in Ex parte Garland that a pardon blots out of existence the guilt of the offender has been repeatedly followed by this Court in subsequent cases. Thus in Armstrong v. United States, 13 Wall., 154, it was held that an unconditional pardon by the President for participation in the Rebellion enables the grantee of the pardon to recover from the United States the proceeds of captured and abandoned property under the Abandoned and Captured Property Act, though no proof be made as required by that act that the claimant never gave any aid or comfort to the Rebellion.

See also

Pargound v. United States, 13 Wall., 156;
United States v. Klein, 13 Wall., 129.

And in Carlisle v. United States, 16 Wall., 147, it was held that the pardon releases "claimaints of the proceeds of captured and abandoned property from the consequences of participation in the Rebellion, and from the necessity of establishing their loyalty in order to prosecute their claims."

See also

United States v. Padleford, 9 Wall., 513.

In Boyd v. United States, 142 U. S., 450, it was held that the full and unconditional pardon of a person convicted of larceny and sentenced to imprisonment therefor completely restores his competency as a witness, although it was stated in the pardon that it was given for that purpose. In that case the Court said, at pages 453-454: "The disability to testify being a consequence, according to the principles of the common law, of the judgment of conviction, the pardon obliterated that effect."

No decision of this Court has been found passing directly upon the question of whether a person who has been pardoned may be subsequently prosecuted as a second offender, but we respectfully submit that the decisions of this Court which we have hereinbefore referred to lay down principles that when applied to the case at bar inevitably compel the conclusion that the pardon of the plaintiff in error by the President so wiped out the guilt of the grantee of the pardon that he could not thereafter be indicted and convicted as a second offender and subjected to the additional or increased punishment imposed for the commission of a second offense.

In Ex parte Garland, 4 Wall., 333, 381, the Court said:

> "The effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offense of treason, committed by participation in the Rebellion. So far as that offense is concerned he is thus placed beyond the reach of punishment of

> any kind. But to exclude him, by reason of that offense, from continuing in the enjoyment of a previously acquired right, is to enforce a punishment for that offense, notwithstanding the pardon."

This language is fairly applicable to the case at bar. The plaintiff in error, after he had been convicted in the United States court for an offense against the United States, was subjected to a certain specific disability in addition to the punishment imposed by the Federal laws for the commission of that offense, this disability being the liability to be punished as a second offender under the laws of the State of New York in the event he committed an offense against the laws of that State.

We respectfully submit that the pardon removed the disability in question, so that after the granting of the pardon, he could not be tried or convicted under the New York laws as a second offender. In other words, after the pardon was granted, and after the plaintiff in error had been charged with the commission of an offense against the laws of the State of New York, he was entitled to be tried, not as a second offender, but as a citizen of the United States, as an ordinary person, and that he could not lawfully be subjected to the disabilities imposed upon a second offender, as those disabilities had been removed by the pardon.

Bishop in his New Criminal Law, vol. 1, sec. 919, says:

> "If a second offense is made by statute more heavily punishable than the first, then if the first is pardoned, it is obliterated, the consequence of which is that a later offense afterwards committed is not a second, and is punishable only as a first. We have a

> case wherein this reasoning was overlooked and the contrary was held; the learned judge observing that the pardon 'neither did nor could relieve from any penal consequences resulting from a different offense committed after the pardon and never pardoned.' True, but the pardon by annulling the first offense prevented another from being the second."

In some of the cases which will be hereinafter cited, holding that a person who has been pardoned for the first offense may be punished as a second offender, an attempt is made to justify the decisions on the ground that the increased punishment is for the second offense solely and is no sense a part of the punishment for the first offense. With all respect we submit that this reasoning is fallacious, as the second offender suffers the increased punishment solely because of the commission of the first offense. Where the first offense has been pardoned nothing remains on which to base punishment of the offender as a second offender.

Though, as we have shown, this Court has never passed upon the question of whether a person pardoned for the first offense may be punished as a second offender, there are decisions in several of the state courts on this question, and these decisions are conflicting.

Virginia Decisions.

In Virginia there is a statute providing that when a person is convicted of an offense and sentenced to confinement therefor in the penitentiary and it appears in the manner prescribed by law that he has before been sentenced in the United States to a like punishment, a term of five years shall be added to the

term for which he would otherwise be sentenced. The Virginia Supreme Court of Appeals, in holding that a person who has been pardoned for the first offense cannot be subjected to the increased punishment prescribed for a second offender, said:

> "By the pardon in question, therefore, the plaintiff in error was not only relieved of the punishment annexed to the offense for which he had been convicted, but of all penalties and consequences, except political disabilities, growing out of his conviction and sentence. One of those consequences was the liability to which it subjected him to receive the additional punishment prescribed by the statute, in case he should be afterwards sentenced to the penitentiary of the State. That additional punishment has been imposed in this case, not by reason of the sentence for the second offense alone, but in consequence of that sentence and the sentence in the former case. Both causes must exist to go to produce the effect contemplated by the statute; in the absence of either no case is made for the imposition of the additional punishment the statute prescribes. But as the offense was in legal contemplation blotted out and its consequences removed by the pardon of the governor, it must be regarded, for the purposes of this case, as though it had never been committed."
>
> Edwards v. Commonwealth, 78 Va., 39; 49 Amer. Reps., 377; approved in Puryear v. Commonwealth, 83 Va., 51.

Ohio Decisions.

In Ohio the courts have passed upon this question and have adopted the reasoning of the

Virginia court. In State v. Martin (59 Ohio St., 212; 69 Amer. St. Rep., 762; 52 N. E., 188; 43 L. R. A., 94), the court said:

> "The question presented by the exception is whether a former conviction and imprisonment for a felony on account of which the Governor has granted an unconditional pardon may be regarded as one of the former convictions necessary to place the accused in the category of habitual criminals as defined by the act. It may be that the criminal habit is as certainly indicated by the commission of felonies for which unconditional pardons have been granted as by those whose penalties have been suffered to the end. But we must presume that the legislature enacted this section intending that the thing should be construed according to the commonly received view as to the effect of a pardon. That view with relation to cases of this character is that if a second offense is made by statute more heavily punishable than the first, then if the first is pardoned it is obliterated, the consequence of which is that a later offense afterward committed is not a second but is punishable only as a first."
>
> Bishop's New Crim. Law, sec. 919;
> Edwards v. Commonwealth, 78 Va., 39.
>
> "The case of Mount v. Commonwealth, 2 Duvall, 93, has not been accepted as a correct statement of the law. Exception overruled."

The decision in State v. Martin was followed in State v. Anderson, 7 Ohio N. P., 562; 5 Ohio S. & C. P. Decisions, 548; and in State v. Williams, 7 Ohio, 562.

Kentucky Decisions.

In Kentucky a contrary rule has been laid down. Thus in Mount v. Commonwealth, 2 Duvall (Ky.), 93, it was held that one who had been convicted of a felony and pardoned by the Governor and who is subsequently convicted of another commission of the same offense, may be sentenced for twice the time that he was sentenced for the first offense. The court said in that case, at page 595:

> "The pardon relieved the convict of the entire penalty incurred by the offense pardoned, and nothing else or more. It neither did nor could relieve from any penal consequences resulting from a different offense committed after the pardon and never pardoned. The increased punishment prescribed by statute for the subsequent offense was no part of the penal consequences of the first offense, but applied exclusively to the last as aggravated by repetition of the same crime. * * * In any aspect the accumulated punishment is for the last and not at all for the first offense; and, of course, a pardon of the first could in no way or degree operate as a pardon of the last offense or omission of any portion of the punishment prescribed for the perpetration of it."

That case was approved and followed in Stewart v. Commonwealth, 2 Ky. Law Rep., 386, and Herndon v. Commonwealth, 105 Ky., 197 (20 Ky. Law Rep., 1114 48 S. W., 989; 88 Amer. St. Rep., 303).

We submit, however, that this decision is unsound and that the reasoning upon which it is based, namely, that the increased punishment is

solely for the second offense, is likewise unsound. The liability to trial as a second offender is a disability which attaches to the conviction for the first offense. When the offender is pardoned for the first offense the conviction is wiped out and the disability disappears, so that the grantee so pardoned cannot be indicted or tried as a second offender.

Pardons in Other Cases.

There are numerous cases not directly involving the point under consideration which lay down principles sustaining our contention. Thus in Easterwood v. State, 34 Texas Crim., 400, 410, the court said:

> "Where a full pardon takes effect, all disabilities disappear, and the grantee stands as if he had never been convicted. The removal of the conviction necessarily removes the disabilities because they are but consequences of the conviction. This would, therefore, restore the party to his right of suffrage and his competency as a juror."

In Jones v. Board of Registrars of Alcorn County, 56 Miss., 736 (31 Amer. Rep., 385), it was held that a man who has been convicted of embezzlement in the Federal Court for Mississippi and who is subsequently pardoned by the President of the United States before the expiration of his term of imprisonment is restored to his right to be registered as a voter of the State. In that case the court said (pp. 760- 770): 770):

> "A pardon by the court is an act of sovereign grace, proceeding from the same source which makes conviction of crime a ground of exclusion from suffrage. The act of dissolution is of as high derivation and

character as the act of proscription. The pardon must be held to rehabilitate the person in all his rights as a citizen and to deny to any officer of the State the right to impute to him the fact of his conviction. After the pardon, he is as if he was never convicted. It shall never be said of him that he was convicted. The pardon obliterates the fact of conviction and makes it as if it never was. We have spoken of a pardon by the Governor, because our constitution relates to that. The case before us involves a pardon by the President of the United States, of a person convicted under the laws of the United States. The same effect must be given to such pardon as to a pardon by the Governor, of one convicted under the laws of the State. And if conviction under the laws of the United States will exclude from suffrage under our Constitution, a pardon by the President must absolve from guilt and free from all the consequences of conviction, in the same manner and of as full extent as would a pardon by the Governor to one convicted under the laws of the State.

"The view opposite to the foregoing is that the intent of the Constitution is to exclude from suffrage the class of persons deemed unfit to be allowed to exercise this privilege, and that their unfitness is evidenced by the fact of conviction of crimes or misdemeanors; and that, as a pardon does not destroy the fact of their conviction, they are excluded because of their unfitness, thus evidenced. We reject this view because its adoption requires the assumption that the grant of the power to pardon, as contained in the Constitution, is of less force than those provisions which contemplate the exclusion of certain persons from suffrage. Our view is that the grant of the power to pardon embraces all the effects of a pardon when granted, and that the object of con-

> ferring this beneficient was that its exercise might affect all those consequences which were understood to flow from such act of grace authorized by the sovereign toward the citizen."

In Perkins v. Stevens, 24 Pick., 277, it was held that a pardon of one convicted and sentenced for an infamous offense restored his competency as a witness, though a remission merely of his punishment does not restore such competency.

In In re Deming, 2 Johns. (N. Y.), 233, 483, it was held that a person sentenced to the State prison for life and afterwards pardoned is restored to his rights and duties as a parent and becomes entitled to the custody of his infant children, who had been on account of his civil death placed under the care of guardians appointed by the Surrogate.

The rule has been laid down that "a pardon so clears the offender of the infamy incident to his crime that thereafter he may maintain an action for slander against one who attributes to him a present criminality arising out of the pardoned offense." (24 Amer. & Eng. Ency. of Law, 2nd edition, 589, 590.)

Thus in Coddington v. Wilkins, Hob., 81, it was held that one cannot say of another that "he is a thief" after the person spoken of has received a pardon, general or special. And in Leyman v. Lattimer, 3 Exch. Div., 15, 352, it was held that it was libelous to publish of a man that he is "a felon," though such man has been convicted of a felony, where he has received the Queen's pardon.

It is proper to state, however, that in Baum v. Close, 5 Hill (N. Y.), 196, it was held that in an

action for slander for accusing the plaintiff of having stolen an axe several years previously, the defendant may defeat the action by proving the truth of the words, thuogh the plaintiff after having been convicted of the offense was regularly pardoned.

An English statute, 33 and 34 Victoria Chapter 29, section 14, provided:

> "Every person convicted of felony shall forever be disqualified from selling spirits by retail, and no license to sell spirits by retail shall be granted to any person who shall have been convicted as aforesaid. * *"

Upon an application for a license to sell spirits by retail it appeared that the applicant had been convicted of felony but had received a pardon. The court held that the disqualification imposed upon him by section 14 was removed by the pardon, and that the license might be granted him. (Hay v. Justice of the Tower Division of London, 24 Q. B. D., 561.) In that case the court said, per Pollock, B., at page 564:

> "The general question of law next to be considered is, what was the effect of the pardon which John Hay obtained? By the prerogative of the Crown the pardon extends far beyond the mere discharge of the prisoner from any further imprisonment. It is a purging of the offense."

And in the same case the court said, per Hawkins, J.:

> "Directly the crime of which a man has been convicted is pardoned, he is absolved not only from the punishment inflicted upon him by the judge who pronounces sentence, but from all penal consequences, such as the disqualification from following his occupa-

tion. * * * It has been argued that the Queen's pardon may be granted for other reasons than innocence. That a notorious thief may have received the Queen's pardon in consideration of his having informed and given evidence against his accomplices. I do not know how that may be. Perhaps if he had been convicted and suffered part of his sentence and showed contrition some remission of the sentenced rather than a Queen's pardon would be granted. Having regard to the whole matter and the argument in the present case, I have come to the conclusion that the effect of the Queen's pardon operating on a crime of which the alleged offender had been convicted was to absolve him, not only from the actual punishment imposed by the judge, but from all the other penal consequences to which I have referred."

POINT III.

The pardon granted to the plaintiff in error was full, absolute and unconditional.

The pardon granted by the President to the plaintiff in error was full, absolute and unconditional; and its absolute and unconditional character was in no wise restricted or impaired by the fact that it contained the recital that it was granted "to restore his civil rights."

In Ex parte Garland, 4 Wall., 333, it was held that one of the effects of the pardon is to restore the civil rights of the grantee. As a full pardon restores the civil rights even though it does not expressly say so, the addition of these

words is mere surplusage, and does not restrict the full and free operation of the pardon. It is possible that the fact in the mind of the person who drew the instrument was that, inasmuch as the pardon was issued after the grantee had served his term and therefore was issued too late to remit his punishment, it might be well to express some reason for the issuance of the pardon. Conceding this to be so, we respectfully submit that it might well be said that one who is placed under the disability of being tried as a second offender is being deprived of a civil right.

Furthermore, no matter what the purpose of the pardon was, and no matter what the reason was for issuing it, it was a full, absolute and unconditional pardon.

In Boyd v. United States, 142 U. S., 450, the court held that the recital in the pardon that the District Attorney had requested it to restore the grantee's competency as a witness did not alter the fact that the pardon was by its terms "full and unconditional."

In the case at bar the pardon does not in terms say that it is full and unconditional, but on the other hand the pardon is granted without any words of restriction or limitation except such as may be spelled out of the words "to restore his civil rights," and those words, we submit, are in no wise restrictive, but are at most merely explanatory and descriptive of the reason which prompted the issuance of the pardon.

POINT IV.

The pardon should be liberally construed.

> "Pardons are to be construed most faforably to the convict."
>
> Ex parte Hunt, 10 Ark., 284, 286.

> "It is a well-settled rule of construction of pardons that inasmuch as a pardon is an act of clemency and grace, and moreover since it partakes of the nature of a deed, it shall be construed strictly as to the grantor and liberally as to the grantee."
>
> 24 Amer. & Eng. Ency. of Law, 574.

To the same effect see 11 Opinions of Atty. Gen. 230.

> People v. Pease, 3 Johns. Cases (N. Y.), 333.

See also Osborn v. United States, 91 U. S., 474, holding that limitations upon the operation of a pardon should be strictly construed.

> "Every limitation or restriction annexed to a pardon must be reasonable and consistent with sound rules of law, and must not be repugnant to the pardon itself; hence where the pardon is granted with certain restrictions annexed thereto which are incongruous with, and repugnant to, the pardon, the restrictions will be rejected and

the pardon will be held to be full and absolute."

24 Amer. & Eng. Ency. of Law, 2nd edition, p. 577.

That statement is supported by the decision in People v. Pease, 3 Johns. Cases (N. Y.), 333, wherein it was held that a proviso annexed to a pardon that it was not to be so construed as to relieve the grantee from the legal disabilities arising from his conviction and sentence must be rejected and that the grantee was a competent witness.

We respectfully submit, therefore, that if there is any doubt as to whether the pardon in the case at bar is full, absolute and unconditional, that doubt should be resolved in favor of the plaintiff in error.

POINT V.

The pardon obliterated the former conviction, though it was granted after the completion of the term of imprisonmen.

Mr. Justice Laughlin in the concurring opinion written by him in People v. Carlesi, 154 App. Div., 487, 488, laid stress upon the fact that the pardon proved by the plaintiff in error was granted after he had completely served his sentence, and the further fact that it was expressly limited to restoring his citizenship, saying, "Therefore the *conviction* remains unaffected." We respectfully submit that the distinction drawn by Mr. Justice Laughlin was unsound.

"A pardon granted to an offender after he has fully expiated his crime by suffering the punishment imposed by law has the same effect thereafter as a pardon granted before the completion of the punishment; it removes the infamy of guilt and all its attendant incapacities and disabilities and makes the defendant, as it were, a new man."

24 Amer. & Eng. Ency. of Law, 2nd ed., p. 594.

The proposition just laid down finds ample support in the following cases:

United States v. Jones, 2 Wheeler Crim. (N. Y.), 451;
9 Opinions Attorney General, 478;
Singleton v. State, 38 Fla., 297; 56 Amer. St. Rep., 177;
State v. Baptiste, 26 La. Ann., 134;
Satton v. McIlhany, I Ohio Decisions, 235; 5 West. L. J., 356;
Stetler's case, 2 Phila (Pa.), 302;
9 Legal Int., 38.

Se also Boyd v. United States, 142 U. S., 450.

"It is well settled that a pardon may be granted after the convict has suffered the entire punishment to which he has been doomed, and that the effect in such case is to restore his competency as a witness."

State v. Foley, 15 Nev., 64, 69.

Conclusion.

We respectfully submit that the judgment of the Court of General Sessions of the Peace in

and for the County of New York convicting and sentencing the plaintiff-in-error of the alleged crime of forgery in the second degree as a second offence was erroneous, and should be reversed.

Respectfully submitted,

GEORGE GORDON BATTLE,
Attorney for Plaintiff in Error.

ALMUTH C. VANDIVER,
JAMES E. BRANDE,
JOSEPH WEBER,
JOHN CALDWELL MYERS,
J. JOSEPH LILLY,
Of Counsel.

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United States Supreme Court

CHARLES CARLESI, alias CHARLES CARLESE,

Plaintiff in Error,

against

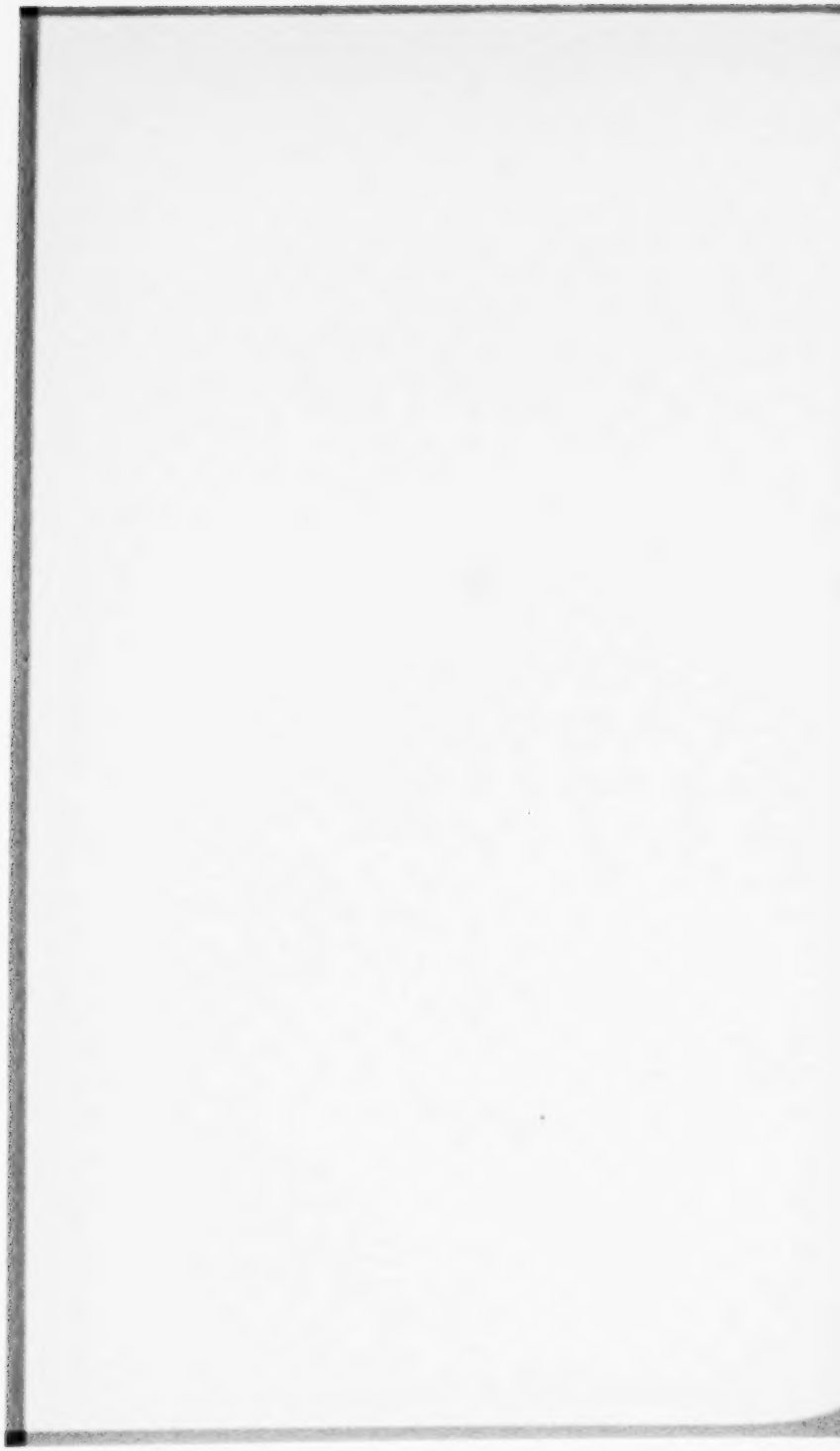
THE PEOPLE OF THE STATE OF NEW YORK,

Defendant in Error.

Reply Brief in Behalf of Plaintiff in Error.

GEORGE GORDON BATTLE,
Attorney for Plaintiff in Error,

ALMUTH C. VANDIVER,
J. JOSEPH LILLY,
Of Counsel.



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SUPREME COURT OF THE UNITED STATES.

CHARLES CARLESI, alias CHARLES CARLESE, Plaintiff in Error, *against* THE PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.	October Term, 1913, No. 679.

REPLY BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

Statement.

Plaintiff in error will address himself in this Reply Brief to the following Points considered in Defendant-in-error's brief:

1. The Statutes of New York recognize "felonies as second offences" as separate and distinct crimes, aggravated in degree.

2. Presidential pardons under the decisions of this Court do not obliterate the first offenses and all consequences thereof and do not relieve first offenders of disabilities of additional punishment when second offense is committed.

3. Recipients of Pardons are not expressly excluded from the present Second Offense Statute.

4. No Federal Question is involved herein.

Plaintiff in error earnestly urges the negative of each of these propositions as follows:

POINT ONE.

The Penal Law of the State of New York defines no crime designated as "Forgery in the Second Degree as a Second Offense."

The Code of Criminal Precedure provides for no allegation of the prior offense in the indictment, nor for proof of the same on the trial.

Forgery in the second degree is defined in Section 887 of the Penal Law.

The indictment must contain "a plain and concise statement of the act constituting the crime without unnecessary repetition."

Sec., 275 Code of Crim. Proc. N. Y.

The form of the same is set forth in Sec. 276 (idem.).

The Indictment must charge but one crime and in one form. (sec. 278 idem.)

Words used in a statute to define a crime, or other words conveying the same meaning must be used. (Sec. 283 idem.)

The act or omission charged as the crime must be stated with such a degree of certainty as to enable the Court to pronounce judgment upon a conviction **according to the right of the case.** (Sec. 284 Subd. 7 idem.)

Neither presumptions of law **nor matters of which judicial notice is taken need**

be stated in an indictment. (Sec. 286 idem.)

No person can be subjected to a second prosecution for a crime for which he has once been prosecuted and duly convicted. (Sec. 9 idem.)

No person can be punished for a crime except upon **legal** conviction. (Sec. 3 idem.; Sec. 31 Penal Law.)

A crime is a felony or misdemeanor. (Sec. 2 Penal Law.)

Nowhere in the above citations from the Penal Law and the Code of Criminal Procedure is there the slightest provision for pleading a former conviction in an indictment or proving the same on the trial.

Nowhere in the brief of the defendant in error is there the slightest reference to any statute, or provision of the Penal Law or Code of Criminal Procedure authorizing such procedure.

True, at page 4 of the brief a portion of Section 470 B of the Code of Criminal Procedure is set forth as follows:

> "For the purpose of indictment and conviction of a second offense, the plea or verdict and suspension of judgment shall be regarded as a conviction and shall be pleaded according to the fact * * *."

Upon the first view, this would seem to be an authorization to plead a former conviction in an indictment for a second offense.

Such is not the fact.

This section provides that where there has been **suspension of judgment**, after conviction by plea or verdict, notwithstanding this judicial clemency, the defendant shall be regarded as a convict for the purpose of indictment and conviction as a second offender and that the fact shall be pleaded. In other words

a convict having received a suspension of judgment is a convict, nevertheless, for purposes of increased punishment as a second offender.

Yet, the Court of Appeals of New York, in the case of the People v. Fabian (192 N. Y., 443 [1908]), held that where judgment has been suspended upon a convict, he did not fall within the prohibition of the laws of 1901, Ch. 654,, Sec 2. Subdivision 10, to the effect that "No person who has been convicted of a felony shall have the right to register for or vote at any election **unless he shall have been pardoned** and restored to the rights of citizenship."

This Section above cited (Sec. 470 B) is the nearest approach to statutory authority the defendant in error can refer to authorizing the plea of a prior offense in an indictment, and proof thereof at the trial, **where the defendant has not received a suspension of judgment** but has been duly sentenced for his crime.

Where the State Statutes are silent upon this point of procedure can it be successfully urged that judicial decisions of the State may read into the Code of Criminal Precedure provisions which the legislature has not put there and may authorize such plea and proof to the detriment and prejudice of the defendant?

The defendant in error relies upon the case of the People v. Sickles, 156 N. Y., 541 (1898), decided ten years before the case of the People v. Fabian (supra).

In that case it was held by a non-unanimous court that a former conviction might be set forth, in an indictment charging a subsequent offense, and proved as a fact on the trial therefor.

No provision of the Code of Criminal Procedure was cited to justify this view.

Nor did the Court decide that Sec. 688 of the Penal Code (the present section 1941 of the Penal Law) **defined any new crime.**

Judge Gray said:

> "The statute, in question, is not dealing with, nor regulating, criminal procedure, but is declaring the **enhanced penalty** which a subsequent offender against the laws of the state will incur upon conviction. When the People present a case under its provisions, the procedure to establish it is **governed by the provisions of the Code of Criminal Precedure.** The indictment of the person accused of being a second offender must bring the case within the statute, by setting forth the facts depended upon for the imposition of the severer punishment prescribed by the Penal Code. (People v. Powers, 6 N. Y., 50; Wood v. People, 53 ib., 511; Johnson v. People, 55 ib., 512.) This is necessary in penal proceedings, in order that the defendant may be clearly informed of the charge which he is called upon to meet. The Code of Criminal Procedure requires it and it is in accord with all just penal legislation. In such case as this, the charge is not merely that the prisoner has committed the offense specifically described, but that, as a former convict, his second offense has subjected him to an enhanced penalty. In Wood v. People (supra), it was held that it was an essential ingredient of the aggravated offense, charged upon the accused, that the alleged felony was committed after a former conviction of an offense, and that the prior conviction entered into and made a part of the offense of which the accused was convicted. Judge Allen observed that, 'When the stat-

> ute describes the offense, the proof, as well as the allegations of the indictment, must bring the case within the statute. * * * The defendant should be brought within all the material words of the statute, as well by the proof as by the indictment.' "

In this case there was a strong dissent by Judge Bartlett, which we urge upon the attention of this Court, calling especial attention to Judge Bartlett's observation that:

> **"The mere fact that for years it has been the practice to plead and prove the former conviction on the trial for the second offense does not show that the constitutional question has necessarily been passed upon, but rather overlooked."**

The dissent, in full is as follows:

> "Bartlett, J. (dissenting). I am unable to agree with the majority of the court that this defendant was convicted by due process of law.
>
> It is the boast of the common law that every accused person is presumed to be innocent until proven guilty, and we have made this presumption a part of our criminal procedure (Code of Criminal Procedure, Sec. 389).
>
> The fact that a second conviction of felony subjects the defendant to a heavier penalty **is no justification for pleading the first conviction in the indictment for the second offense.**
>
> In People v. Raymond (96 N. Y.. 38) Judge Finch, speaking for the court, said: 'The first offense was not an element of or included in the second, and so subjected to added punishment, but is simply a fact in the past history of the criminal, which the law takes into consideration when prescribing punishment for the second offense. That only is punished.'

In other words, the fact of a first conviction does not become material until after the second conviction, and then only for the purpose of enabling the trial judge to impose the proper term of the imprisonment.

The first conviction can be established by the production of the record before the trial judge, and the only possible fact to be litigated would be the identity of the defendant if disputed. If this inquiry into the past history of the accused is to be made by a jury the legislature should provide that the jury who have just rendered their verdict of guilty, or a new one to be drawn, shall hear the evidence and determine the question. This has been the law of England for fifty years and more.

To project the issue of a former conviction into the second trial before verdict rendered, practically deprives the defendant of the legal presumption of innocence, inevitably prejudices the jury against him, and takes from him his constitutional right to be convicted only by the judgment of his peers and due process of law.

It is urged that the constitutional question is not an open one in this court, and to support the contention two cases are cited. (Wood v. People, 53 N. Y., 511; Johnson v. People, 55 N. Y., 512.) In neither of these cases was the constitutional question raised; they deal wholly with procedure.

The mere fact that for years it has been the practice to plead and prove the former conviction on the trial for the second offense does not show that the constitutional question has necesarily been passed upon, but rather, overlooked.

This practice is a reproach to the administration of justice, and speedy legislation should render it impossible."

Counsel for plaintiff in error in the Trial Court raised the point that the plaintiff in error could be tried only as a first offender by moving to strike from the indictment the provisions relating to the previous offense on the ground that the pardon had obliterated the effects of the same. Thus, the Federal question was raised at the inception of the trial.

In view of the foregoing, the contention of the plaintiff in error, is:

1. The Penal Law and the Code of Criminal Procedure do not authorize the plea and proof of the second offense.

2. Custom and practice, erroneous and prejudicial, persisted in for years is the only sanction for such procedure.

3. The Second Offense Law of New York (Sec. 1941 P. L.) defines no specific crime.

4. It merely prescribes an increased punishment which must be imposed when judgment is passed upon a second offender.

The propositions (1) and (2) have been already discussed. We will now address ourselves to (3) and (4)

The defendant in error seems to be in accord with our view that Section 1941 of the Penal Law of New York relates only to **punishment.**

The Statute is set out in his brief, at page 3, and on page 4 he says of the punishment referred to therein:

> **"The increased punishment is inflicted solely for the later crime, the grade of which is deemed to be increased by the fact of a former conviction."**

Our view that this statute refers only to punishment, is apparently borne out by the cases cited by the defendant in error.

In the case of People v. Raymond (96 N. Y., 38) Judge Finch said:

> "The first offense was not an element of or included in the second, and so subjected to **added punishment,** but is simply a **fact** in the past history of the criminal which the law takes into consideration when prescribing punishment for the second offense. That only is punished."

The attention of the Court is called to the fact that in the Raymond case the indictment set out the first offense but that the defendant was convicted of "Forgery in the first degree" the proper crime defined in the law. In the case at bar, plaintiff in error was indicted for and convicted of "forgery in the second degree as a second offense," a crime unknown to the statute law of the State of New York, and punished as such.

In the case of Graham v. West Virginia (224, U. S., 616, 1911), which is perhaps the latest consideration of second offense statutes by this Court, Justice Hughes said concerning second offenders:

> "They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted."

And referring to McDonald v. Mass., 180 U. S., 311, cited with approval in Justice Gray's opinion in the State Court as follows:

> "The punishment is for the **new crime** only, but is the heavier if he is an habitual criminal."

Citation of further authorities, it is submitted, is unnecessary to establish that the New York second offense statute established no new crime—indeed none is set out therein—but merely provides for the **punishment** of second offenders.

It this be so, plaintiff in error should have been indicted for the commission of the crime of forgery in the second degree and convicted for such instead of being indicted for "forgery in the second degree as a second offense" and convicted as such.

STATE STATUTES.

In the West Virginia case (Graham v. W. Va., supra) the former offense was not pleaded in the indictment. The Statute provided for its ascertainment in a separate proceding. Such is the case in many states. Mr. Justice Hughes said on this point:

> "While it is **familiar practice** to set forth in the indictment the fact of prior conviction of another offense and to submit to the jury the evidence upon that issue together with that relating to the commission of the crime which the indictment charges still in its nature it may appropriately be the subject of a separate determination (p. 625).

The Virginia statute referred to in Edwards v. Com. (78 Va. 39) ,provided for the ascertainment of the prior offense in a separate proceeding.

The Ohio statute (Sec. 4131 Gen. Code, Page & Adams Annotated Code, p. 458 and Sec. 13741 idem.), specifically provides that the prior offense shall be charged in the information or complaint.

The Wisconsin statute also provides that the former conviction shall be set out in the information or indictment (Sec. 4737 Wisconsin Statutes).

To the same effect are the Statutes of Indiana (Sec. 2173 Burns Annotated Indiana Statutes p. 999).

POINT TWO.

The pardon of the President obliterated the effects and consequences of plaintiff in error's first crime and relieved him from all disabilities incident thereto including the disability of added imprisonment upon subsequent conviction.

This precise point, as both parties have observed in their main briefs, is novel in this Court. Yet the very recent utterance of Mr. Justice Hughes in the case of Graham v. W. Va. (supra), which the defendant in error terms "dictum" (Brief p. 74) tends to indicate the trend of the view of this Court, concerning the effect of pardons.

The constitutionality of the Statute of West Virginia, providing for heavier penalties on persons convicted of crime if previously convicted, was under consideration, and especially the proceedings relating to identification:

Mr. Justice Hughes said:

> "Full opportunity was accorded to the prisoner to meet the allegation of former conviction.

Plainly the statute contemplated a valid conviction which had not been set aside or the consequences of which had not been removed by absolute pardon.

No question as to this can be raised here, for the prisoner in no way sought to contest the validity or unimpaired character of the former judgments, but pleaded that he was not the person who had thus been convicted. On this issue he had due hearing before a jury."

In the case of plaintiff in error there was no "valid conviction * * * the consequences of which had not been removed by absolute pardon."

He had such a pardon and strenuously urged in the Trial Court, to no avail, that the same had "removed the consequence" of the crime of which he had been pardoned.

He raised the question below, in each Court, without success, and in this Supreme Tribunal, finally, he "contests the validity and unimpaired character of the former judgment" of conviction rendered against him.

Is the view of the learned Justices of this Court as to the power of the President and of the scope, extent and effect of his clemency as announced in a long and unbroken line of decisions to prevail or is the mistaken view of the Appellate Courts of the State of New York based upon fallacious reasoning in early cases, followed to the present day, to be given full force and effect to the prejudice and detriment of this defendant and in violation of his inalienable rights guaranteed to him by the Constitution of the United States?

We submit that this Court should, and we believe that it will, follow the rule as originally laid down by the Chief Justice in the Wilson case and as followed to the present day, as more fully appears by the following:

The Wilson Case:

> "A pardon * * * exempts the individual on whom it is bestowed, from the punishment the law inflicts for a crime he has committed." (7 Peters, 160.)

The Garland Case:

> "A pardon * * * blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense." (4 Wall., 380.)

The Padelford Case:

> "Proof of pardon is complete proof that Padelford had given no aid or comfort to the Rebellion." (9 Wall., 531.)

The Klein Case:

> "Pardon includes amnesty. It blots out the offence pardoned and removes all its penal consequences." (13 Wall., 147.)

The Armstrong Case:

> "All Courts are bound to give effect to Presidential Pardon." (13 Wall., 154.)

The Pargound Case:

> Following the Armstrong case (supra) (13 Wall., 156).

The Carlisle Case:

> "Pardon relieves of consequence of offending whether it is regarded as blotting out offense or excluding recipients from operation of the statute." (16 Wall., 147.)

The Osborn Case:

"It is of the very essence of a pardon that it releases the offender from the consequences of his offense." (91 U. S., 477.)

The Knote Case:

"Pardon so far blots out offense that afterwards it cannot be imputed to him to prevent the assertion of his legal rights." (95 U. S., 153.)

The Hart Case:

"We do not depart in the least from what was held on the subject of pardons in the cases of Ex Parte Garland" et alii. (118 U. S., 67.)

The Bosworth Case:

"Pardon removes disabilities and restores property control."
(Ill. Cent. R. R. v. Bosworth, 133 U. S., 103.)

The Boyd Case:

"Incompetency as witness obliterated by pardon." (142 U. S., 454.)

The Brown Case:

"The distinction between amnesty and pardon is of no practical importance. It is said in Knote v. United States, 95 U. S., 149, 152, 'the Constitution does not use the word 'amnesty,' and, except that the term is generally applied where pardon is extended to whole classes or communities, instead of individuals, the distinction between them is one rather of philological interest than of legal importance.' Amnesty is defined by the lexicographers to be an act of the sovereign power granting oblivion, or a general

pardon for a past offence, and is rarely, if ever, exercised in favor of single individuals, and is usually exerted in behalf of certain classes of persons who are subject to trial, but have not yet been convicted."
(161 U. S., 601.)

The Graham Case :

"Plainly the statute contemplated a conviction * * * the consequences of which had not been removed by absolute pardon."
(224 U. S., p. 625.)

Against this overwhelming weight of authority the defendant in error cites no case in this Court remotely limiting the rule as emphatically enunciated by the greatest jurists of our time, but relies solely and doubtfully upon the following cases in the State of New York:

The Price Case (1889):

"Pardon of Governor of Georgia does not exempt from increased punishment as second offense. Past acts cannot be obliterated; legal effects can be." (53 Hun, N. Y., 189; affd., 119 N. Y., 650.)

The Baum Case (1843):

"Slander action after pardon may be defeated by proving truth." (5 Hill, 196.)

The Roberts Case (1898):

"Pardoned convict has no claim against the State." (Roberts v. State, 30 App. Div., 106.)

Eighmy Case (1879):

"Recipient a competent witness, after pardon, but weight of his testimony is affected by fact of his conviction." (78 N. Y., 333.)

The Unnamed Attorney's Case (1881):

"Despite pardon, attorney will be stricken from the roll for wrongdoing."

(Matter of an attorney, 86 N. Y., 565.)

The Roberts Case (1899):

Pardoned convict may not maintain action for damages against the State."

(Roberts v. State, 160 N. Y., 217.)

The Sickles Case (1898):

"Where an increased punishment is prescribed by the statute upon conviction for a second offense, the prior conviction enters as an ingredient into the criminality of the prisoner."

(People v. Sickles, 156 N. Y., 547.)

The Raymond Case (1884):

(which is directly contrary to the view expressed in the Sickles case):

"The first offense was not an element of nor included in the second * * * but is simply a fact in the past history of the criminal, which the law takes into effect when prescribing punishment for the second offense."

(96 N. Y., 38.)

The Carlesi Case (at bar):

"Presidential pardon, does not obliterate prior offense and does not relieve convict of prosecution as a second offender."

(154 App. Div. (N. Y.), 481, 208 N. Y., 547.)

In view of the foregoing citations it is respectfully submitted that the views as expressed by the New York Courts, so far as the same are at variance with the decisions of this Court should not be followed and that the judgment in the case at bar should be reversed.

POINT III.

The New York Legislature by expressly repealing the second offence statute specifically including recipients of pardons, intended to, and did exempt such persons from the operation of the present law.

The present section 1941 of the Penal Law is derived from section 688 of the old Penal Code of the State of New York (Laws 1881, Cap. 676, Sec. 688), which it repeals in terms.

Prior to the enactment of the Penal Code the only provisions of the law of New York concerning second offenders were contained in Section 8 and Section 10 of Part 4, Chapter I, title 7, of the Revised Statutes of New York, which despite the enactment in 1881 of the Penal Code (Laws 1881, Cap. 676), containing Sec. 688 above referred to, and the clause (§726):

> "All acts and parts of acts which are inconsistent with the provisions of this act are repealed, so far as they impose any punishment for crime except as herein provided."

remained unrepealed or otherwise expressly affected by the Legislature until the passage of the general repealer act of 1886 (Laws 1886, Cap. 593, sec. I, par. 4).

Sec. 8. Pt, 4, Cap. I, title 7, of the Revised Statutes read as follows:

> "If any person convicted of any offence punishable by imprisonment in a state prison, shall be discharged, either **upon being**

pardoned or upon the expiration of his sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be shall be punished as follows:

1. If the offence of which such person shall be subsequently convicted, be such, that upon a first conviction, an offender would be punishable by imprisonment in a state prison for any term exceeding five years, then such person shall be punished by imprisonment in a state prison, for a term not less than ten years:

2. If such subsequent offence be such, that upon a first conviction the offender would be punishable by imprisonment in a state prison for five years or any less term, then the person convicted of such subsequent offence, shall be punished by imprisonment in a state prison for a term not exceeding ten years:

3. If such subsequent conviction be for petit larceny, or for any attempt to commit an offence, which if committed, would be punishable by imprisonment in a state prison, then the person convicted of such subsequent offence, shall be punished by imprisonment in a state prison for a term not exceeding five years."

Section 10, Pt. 4, Cap. 1, tit. 7, of the Revised Statutes read as follows:

"Every person who shall have been convicted in any of the United States, or in any district or territory thereof, or in any foreign country, of an offence, which if committed within this State, would be punishable by the laws of this state by imprisonment in a state prison, shall, upon conviction for any subsequent offence committed within this state, be subject to the punishment herein prescribed upon subsequent convictions, in the same manner and to the same extent, as if such first conviction had taken place in a court of this state."

It will be observed, although Section 1941 of the Penal Law is practically a compound of the provisions of the Revised Statutes above set out, that the words **"upon being pardoned"** are entirely omitted from the later enactment and its source Section 688 of the old Penal Code.

The Legislatures of 1881 and 1909 must have had some object in omitting the express provision of the Revised Statutes (supra) to the effect that even a pardon for an earlier offense could not prevent the infliction of added punishment in the event of a second violation of the Criminal Laws of the State of New York; and we respectfully submit that the object in the mind of each legislature was the exemption of the pardoned first offender from punishment as a second offender. Otherwise the later statutes cannot be held to have affected the earlier law.

Under the Revised Statutes the pardoned offender was expressly placed upon the same footing before the law, with other convicts who had not received the benefit of the Executive's clemency. Whereas under the Penal Code and the Penal Law there is no such expression of legislative intention. A fair and liberal construction of the later statutes indicates that the legislatures of 1881 and 1909 intended to exclude from the operation of the second offense laws all those who had been pardoned of their initial offenses. Otherwise they would have used the same or similar language to that which was contained in the Revised Statutes. There is no such thing as an equitable interpretation or extension of a penal statute and however desirable the Courts of the State of New York may have thought the implications to be upon which they convicted the plaintiff in error, their reading into the present Section 1941 Penal Law

of the provisions of Section 8 of Title 7, Chapter I, Part 4 of the Revised Statutes should not be permitted to stand especially in view of the fact that two legislatures of the State of New York declined to include that language in their later acts.

The difference in the language used by the Legislatures enacting Sec. 1941 Penal Law and Section 688 Penal Code, which omit all references to pardoned offenses, from that used by the Legislature enacting Section 8, &c., Revised Statutes, supra, where pardoned offenses were expressly included, must be held to have been tentional rather than accidental.

Rich v. Keyser, 54 Pa. State, 86:

> "Was the discrepancy accidental or intentional? The Legislature of 1863 must be presumed to have known what the language of the Act of 1772 was, and what judicial construction had been placed upon it. Then, knowing this, and yet not following it, but substituting for it different language, did they not mean that we should construe their language according to its ordinary import? I see no other ground for judicial construction to rest upon. Indeed, the words of a statute, when unambiguous, are the true guide to the legislative will. That they differ from the words of a prior statute on the same subject, is an intimation that they are to have a different and not the same construction, for it is as legitimate a use of the legislative power to alter prior statutes as to displace the common law."

From an examination of the various second offender statutes passed from time to time by the legislature of the State of New York it must be concluded that a convict pardoned of his first of-

fense is, upon second conviction, intended by the legislature of that State to be exempt from the operation of that law and to be sentenced only as a first offender and that the courts of New York have invaded the rights of property and personal security of this plaintiff in error by the conviction and sentence brought before this Court.

POINT IV.

The Federal question of the effect of the President's pardon was properly raised in the State Court, and this Court has jurisdiction to hear this appeal.

The Judiciary Code of the United States (Section 237) permits an appeal to this Court in the case at bar because:

1st: The appeal brings up for review a final judgment drawing in question the validity of an authority exercised under the United States and the decision of the highest Court of the State of New York was against the validity of such authority, to wit, the validity of the President's pardon.

2nd. Because the validity of Sec. 1941 of the Penal Law of the State of New York insofar as it is repugnant to the pardoning power conferred on the President by Article 2, Section 2, Constitution of the United States, was drawn in question.

3rd. Because the decisions of the Courts of New York were against the right, privilege and immunity especially set up and claimed by the plaintiff-in-error, to be free and protected from prosecution, trial or conviction as a second offender, by reason of his Presidential pardon.

The constitutionality of the proceedings in the State Court upon the trial of plaintiff in error were to use the extension of the term "drawn in question" advocated by the defendant in error, challenged in the Courts of the State of New York:

(a) By the request to charge that the President's pardon blotted out plaintiff in error's offence against the United States (Transcript, fol. 561).

(b) By the motion to dismiss the indictment. (Transcript, fol. 543).

(c) By the motion made at the beginning of the trial to strike from the indictment the allegation charging the plaintiff in error as for a second offence. (Transcript, fol. 11.)

(d) By the other motions and statements to the court made by the counsel for the plaintiff in error appearing in the Transcript and referred to on pages 10 to 13 of our brief in chief.

The validity of the statute (1941 Penal Law) was drawn in question by plaintiff in error upon each of the occasions just mentioned upon the ground that it was repugnant to the Federal Constitution, and its validity was sustained by each of the State Courts through which this action passed.

The plaintiff in error specifically claimed at the trial and in the Appellate Courts of the State of New York the Federal right, privilege and im-

munity of being regarded and treated as a person legally innocent of crime which said claim was denied in the Courts of said State.

The denial of plaintiff in error's asserted Federal right affects the validity of the judgment under review, because had plaintiff in error's pardon been recognized and made effective he could not have been convicted of the alleged crime charged against him, or, in any event, be sentenced to the long term of imprisonment which he is now enduring.

The definite right, privilege or immunity under the Constitution of the United States claimed by plaintiff in error and expressly denied by the courts of New York was the right to be deemed guiltless of his offense against the United States by virtue of the President's pardon. The denial of this asserted right affected the validity of the judgment of conviction, because, unless plaintiff in error's said right had been denied, the judgment under review could not have been rendered.

Straus et al. v. American Publishers Ass'n, 231 U. S., 222.

POINT V.

The pardon restored to plaintiff in error as a "civil right", immunity from increased punishment as a second offender.

"Civil Rights" have been defined in New York as "rights which the laws give a person—which depend upon the laws of the community in which he lives and of which he is a member."

(Bowles v. Habermann, 95 N. Y., 247.)

"A 'civil right' is said by Anderson to be a right accorded to every member of a distinct community or nation, and Bouvier says: 'Civil rights are those which have no relation to the establishment or management of the government. These consist in the power to acquire and enjoy property, and of exercising the paternal and marital powers, and the like.' People v. Barrett, 203 Ill., 99.

"A civil right is the right of a citizen; the right of an individual as an individual; the right due from one citizen to another the deprivation of which is a civil injury for which redress may be sought by a civil action. State of Ohio v. Chicago, etc., R. Co., 37 Fed., 497.

"By 'civil rights which are protected by the Federal Constitution' is meant those rights which the municipal law will enforce at the instance of private individuals, for the purpose of securing to them the enjoyment of their means of happiness. They are distinguished from 'natural rights' which would exist if there was no municipal law, some of which are abrogated by municipal law, while others lie outside of its scope and still others are enforcible under it as 'civil rights.' 'Civil rights' are also distinguishable from 'political rights' which are directly concerned with the institution and administration of government. 'Civil rights' include the right of every citizen to seek redress of wrongs and the enforcement of rights in the courts, and, as incident to this, include the right of a party to testify in a criminal case in his own behalf. State v. Powers, 51 N. J. Law, 432.

"They are the absolute rights of persons, the right of personal security, **the right of personal liberty,** and the right to acquire and enjoy property as regulated and protected by law. They are the rights which, according to the fundamental princi-

ples of American Government are inalienable. People v. Washington, 36 Cal. 658-662."

"Constitution, Article 2, Section 3, which declares that no person shall be denied any 'civil or political right, privilege or capacity' on acount of his religious opinions, means that whatever civil rights, privileges or capacities belong to or are enjoyed by citizens of the State generally, shall not be taken away from or denied any person on acount of any religious views that he may entertain. Hroneck v. People, 134 Ill., 139.

"A 'civil right is a right accorded to every member of a district, community or nation.' Winnett v. Adams, 96 Northwestern 681. (Nebraska.)"

In view of the foregoing, it is respectfully submitted that among the "civil rights" restored to plaintiff in error by the Presidential pardon was the right of immunity from punishment as a second offender common to all other citizens of the community in which he lives.

All of which is respectfully submitted.

GEORGE GORDON BATTLE,
Attorney for Plaintiff-in-Error.

ALMUTH C. VAÑDIVER,
J. JOSEPH LILLY,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 679.

CHARLES CARLESI,

Plaintiff-in-Error,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Defendant-in-Error.

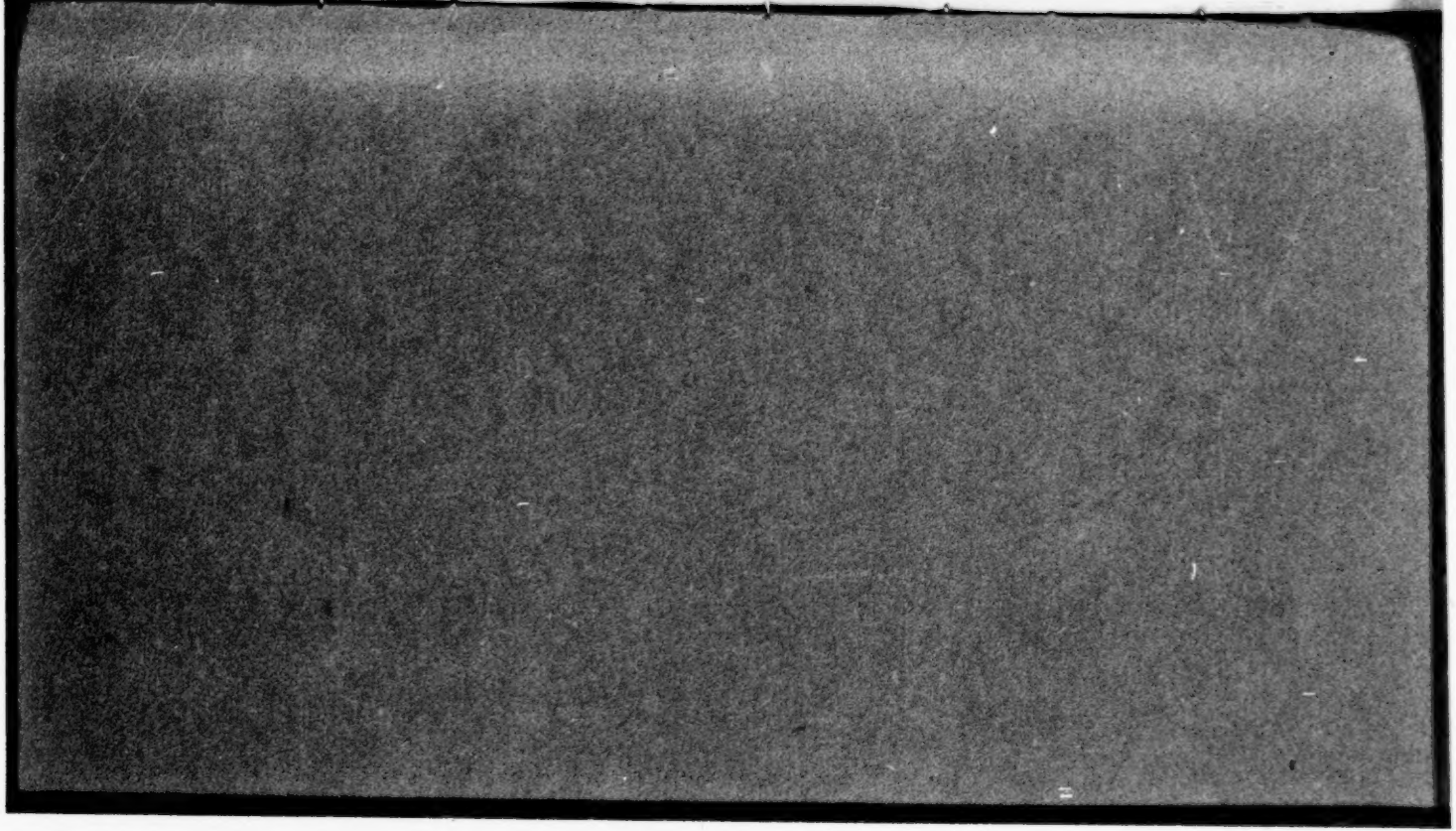
BRIEF FOR DEFENDANT-IN-ERROR.

CHARLES S. WHITMAN,
District Attorney,
New York County.

ROBERT S. JOHNSTONE,
Assistant District Attorney,

STANLEY L. RICHTER,
Deputy Assistant District Attorney,
Of Counsel.

R. H. THIBEL, PRINTER, 206-8 FULTON STREET, NEW YORK.



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Supreme Court of the United States,

OCTOBER TERM, 1913.

CHARLES CARLESI,
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defendant-in-Error.

No. 679.

Brief for Defendant-in-Error.

This case comes before this court on a writ of error directed to the Court of General Sessions of the County of New York, in the State of New York, to review a judgment by which the plaintiff-in-error was sentenced to be imprisoned in the State Prison of New York for the term of twelve years and eleven months on a conviction of the crime of forgery in the second degree, as a second offense.

The original judgment of conviction was rendered in the Court of General Sessions on February 23, 1912. An appeal was taken therefrom to the Appellate Division of the Supreme Court of New York, and subsequently to the Court of Ap-

peals of the State of New York, the highest court of said state, in both of which courts the judgment of conviction was affirmed. (People *v.* Carlesi, 154 App. Div. 481; 208 N. Y. 547). Upon the affirmance of the judgment by the Court of Appeals, that court remitted the record and proceedings to the said Court of General Sessions, and an order was there entered, on April 7, 1913, making the judgment of the Court of Appeals the judgment of the Court of General Sessions and directing that the judgment of conviction be enforced and carried into execution and effect. Thereafter, on June 21, 1913, Mr. Justice Hughes allowed the writ of error upon which the cause now comes before this court.

The Question Involved.

The question, broadly stated, which the plaintiff-in-error is seeking to present to this court for review and determination, is whether a prior conviction had in a Federal Court, for an offense against the laws of the United States, with respect to which a pardon had been granted by the President of the United States, may be lawfully made the basis of the increased punishment prescribed by the statutes of New York for second offenders.

As stated in the report of the Court of Appeals (208 N. Y. 547): "The principal question at issue was as to whether the fact that the defendant had been granted a pardon of his first offence relieved him from the increased punishment prescribed for crimes as second offences."

The New York Statutes.

Section 1941 of the PENAL LAW of New York (L. 1909, Chap. 88, §1941) provides as follows:

> "A person, who, after having been convicted within this state, of a felony, or an attempt to commit a felony, or of petit larceny, or, under the laws of any other state, government, or country, of a crime which, if committed within this state, would be a felony, commits any crime, within this state, is punishable upon conviction of such second offense, as follows:
>
> 1. If the subsequent crime is such that, upon a first conviction, the offender might be punished, in the discretion of the court, by imprisonment for life, he must be sentenced to imprisonment in a state prison for life;
>
> 2. If the subsequent crime is such that, upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for a term not less than the longest term, nor more than twice the longest term, prescribed upon a first conviction."

The section above quoted was not a new enactment in 1909, but was merely a re-enactment and continuation of the provision contained in §688 of the Penal Code of New York. (N. Y. Cons. Laws; Gen. Constr. Law [L. 1909, chap. 27] §95).

It will be observed that the above statute provides that a person who has been "convicted," "under the laws of any other state, government or country of a crime," etc., may be punished for a "subsequent crime," as a second offense—that is to say, an increased punishment may be in-

flicted upon him for the *later crime* by reason of the fact that he had been previously "convicted." The increased punishment is inflicted solely for the later crime, the grade of which is deemed to be increased by the fact of a previous conviction—which in this sense becomes an ingredient in the criminality of the accused. That phase of the case will be more fully discussed hereafter.

The words "convicted" and "conviction" have been frequently defined. They mean that *the fact of guilt has been judicially ascertained and determined—by plea or verdict.*

Blackstone Comm. Vol. IV, 362.
Bishop, New Crim. Law. [8th Ed.] Vol. I § 903.
Bishop, Stat. Crimes, § 348.
Am. and Eng. Ency. of Law [1st Ed.] Vol. IV, p. 140; *Id.* [2nd Ed.] Vol. VII, p. 497.
People *v.* Fabian, 192 N. Y. 443, 450.
Shepherd *v.* People, 25 N. Y. 406.
Comm. *v.* Lockwood, 109 Mass. 323.
Quintard *v.* Knoedler, 53 Conn. 485.
Ex parte Brown, 68 Cal. 176.

That they have this meaning with respect to the matter under consideration is shown by the language of § 470-B of the New York *Code of Criminal Procedure*, which provides:

> "For the purpose of indictment and conviction of a second offense, the plea or verdict and suspension of judgment shall be regarded as a conviction, and shall be pleaded according to the fact." * * *

But even if the words "conviction" or "convicted" were deemed to include the rendition of judgment, it appears in this case that judgment *was* rendered in the Federal Court on the plea of guilty to the prior offense.

POINT I.

No Federal Question is Involved.

The Jurisdiction of This Court.

The right, power and jurisdiction of this Court to review and examine a judgment of a State court is specifically defined and limited by the provisions of §709 of the United States Revised Statutes which are now incorporated in §237 of the JUDICIARY CODE of the United States.

St. Louis & Iron Mtn. Ry. *v.* McWhirter, 229 U. S. 265, 275.
Consol. Turnpike *v.* Norfolk, &c., Ry. Co., 228 U. S. 326, 330, 331.
Seaboard Air Line Ry. *v.* Duvall, 225 U. S. 477, 486, 487.
Appleby *v.* Buffalo, 221 U. S. 524, 529.
Capital Nat. Bank *v.* Cadiz First Nat. Bank, 172 U. S. 425.

That statute—JUDICIARY CODE, § 237—provides as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or stat-

ute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ. [*36 Stat. L. 1156*]."

Inasmuch as there was no decision against the validity of a treaty or statute of, or authority exercised under the United States, in order that the plaintiff-in-error may properly invoke the jurisdiction of this court it must appear:

1. That there was (*a*) *drawn in question* (*b*) the *validity* of a statute of, or an authority exercised under, the state (*c*) *on the ground* of their being repugnant to the constitution, treaties, or laws of the United States, and (*d*) a *decision in favor of their validity;* or

2. That (*a*) a title, right, privilege, or immunity (*b*) was claimed under the constitution, or a

treaty, or a statute of, or commission held or authority exercised under, the United States, and (*c*) a *decision against* the title, right, privilege, or immunity, (*d*) specially *set up or claimed* (*e*) under such constitution, treaty, statute, commission, or authority.

1. The phrase "*drawn in question*" means that the question of the *validity* of the statute or authority—whether they infringed any provision of the Federal Constitution—was "*brought forward and made a ground of decision.*" In other words, the plaintiff-in-error must have challenged the constitutionality of the State statute or the authority exercised under the State, and a decision must have been rendered sustaining the constitutionality thereof—in order that a question may be presented for review by this Court. It is not enough that the facts shown or claimed to exist did not warrant the exercise of the power given by law.

> Champion Lumber Co. *v.* Fisher, 227 U. S., 445, 450, 451, 452.

Decisions of the State courts resting upon the construction, and not upon the validity, of a State statute do not present a Federal question reviewable by this Court.

> Grand Gulf R. R. & B. Co. *v.* Marshall, 12 How. (53 U. S.) 165.
> Lloyd *v.* Matthews, 155 U. S. 222, 227.
> Ross *v.* Oregon, 227 U. S. 150, 161-162, 164.
> Knop *v.* Coal Co., 211 U. S. 485.
> Ferry *v.* King County, 141 U. S. 668.
> Michigan Cent. R. R. Co. *v.* Michigan So. R. R. Co., 19 How. (60 U. S.) 378, 381.
> King *v.* West Virginia, 216 U. S. 92, 101.
> Allen *v.* Alleghany Co., 196 U. S. 458.

The "*validity*" of the statute, either as it reads or is made to read by construction—and not its mere interpretation or application—must have been "drawn in question" on the ground of its being repugnant to the Federal Constitution, and its "validity" sustained, either expressly or by necessary implication.

Scudder *v.* Comptroller of N. Y., 175 U. S. 32, 36.

Water Power Co. *v.* Street Railway Co., 172 U. S. 475, 488.

Miller *v.* Cornwall RR. Co., 168 U. S. 131, 133-134.

Murdock *v.* Memphis, 20 Wall. 590, 633, 634.

2. In order to bring the case within the third class of the statute, it must appear that some Federal right, privilege or immunity was *specifically claimed* and *denied*, either expressly or by necessary implication—that the rulings could not have been made or the judgment given without deciding *against* the *specific* right, privilege or immunity which was set up and claimed.

Consol. Turnpike *v.* Norfolk &c. R. R. Co., 228 U. S. 326, 330, 331.

Seaboard Air Line *v.* Duvall, 225 U. S. 477, 487.

Appleby *v.* Buffalo, 221 U. S. 524, 529.

Western Union Tel. Co. *v.* Wilson, 213 U. S. 52, 53.

Chesapeake & Ohio Ry. Co. *v.* McDonald, 214 U. S. 191, 193.

Waters Pierce Oil Co. *v.* Texas, 212 U. S. 86, 97.

Harding *v.* Illinois, 196 U. S. 78.

Sayward *v.* Denny, 158 U. S. 180, 183.

Smalley *v.* Laugenour. 196 U. S. 93, 96, 98.

When the State court arrives at its conclusions solely on principles of general law, or where the *denial* of the *asserted* Federal right does not affect the validity of the judgment, no Federal question is involved, and the case does not come within the purview of § 237 of the Judiciary Code.

Arkansas So. R. R. Co. *v.* German Bank, 207 U. S., 270, 275.
Franklin *v* South Carolina, 218 U. S. 161, 164.
Los Angeles Milling Co. *v.* Los Angeles, 217 U. S. 217, 225.
C. B. & Q. Railway *v.* Drainage Comm'rs., 200 U. S. 561, 580.
Sayward *v.* Denny, 158 U. S. 180, 184, 186.
Leyson *v.* Davis, 170 U. S. 36, 39.
Rockhold *v.* Rockhold, 92 U. S. 129, 130.

It must appear that a *definite* right, privilege or immunity under the Constitution or laws of the United States was asserted, that *that* right, privilege or immunity was *denied*, either expressly or by necessary implication from the judgment rendered, and that the denial affected the validity of the judgment.

In our consideration of the facts and proceedings, as shown by the record in the State courts, including the opinions, to which we shall now proceed, we shall endeavor to show (1) that the questions presented by the plaintiff-in-error to the State courts for decision and determination by those courts involved merely the *construction or interpretation* of the State statute and whether it applied in a case where the accused had received a pardon for the prior offence of which he had

been "convicted", and that the plaintiff-in-error did *not* "draw in question" the "validity" or constitutionality of the State statute, even if construed to be applicable to such a case. The proposition advanced by the plaintiff-in-error, as adduced from his motions and argument, was, we submit, merely to the effect that a "conviction" could not be deemed to have been in existence if the offence had been pardoned, that the situation was the same as if a conviction had never been had, and that, hence, such a conviction was not within the purview and intendment of the statute; and that, we submit, merely called for a decision depending upon the construction or application of the statute and upon general common-law principles, and did not involve any question of a Federal nature reviewable by this Court.

We shall also endeavor to point out (2) that the only Federal right, privilege or immunity which the plaintiff-in-error sought in reality to assert was the right not to be subjected to any penal consequence by reason of the prior conviction for his offence against the United States. Thus, in the course of his application to have the allegations concerning the prior conviction stricken from the indictment, his claim seems to have been that "if the punishment which the Court would have to consider in case of a conviction is *a penal consequence of his offence*" (Record, p. 13), the rights and immunities secured by him by the pardon would be denied to him. In other words, the right asserted or claimed was the right not to be subjected to any *penal consequence* by reason of the prior offence. That right, we submit, was *not denied* to the plaintiff-in-error, as we shall subsequently more fully point out. The increased

punishment was solely for the later offence committed against the laws of the State of New York in committing the act of forgery charged in the indictment and was not a penal consequence of the prior conviction—and so it was held in this case (154 App. Div. 481, 487; 208 N. Y. 547).

With this preliminary statement of the jurisdictional requirements to be borne in mind, we shall consider the facts and proceedings as shown by the record. It is well settled that the facts necessary to authorize a review must appear in the "record" of the state court; deficiencies therein cannot be supplied either by the petition for the writ of error, or by the assignments of error in this court.

Appleby *v.* Buffalo, 221 U. S. 524, 529
Mallers *v.* Comm., L. & T. Co., 216 U. S. 613.
Montana *v.* Rice, 204 U. S., 291.
Corkran Oil Co. *v.* Arnaudet, 199 U. S. 182.
Harding *v.* Illinois, 196 U. S. 78.
Mich. Cent. R. Co. *v.* Mich. S. R. Co., 19 How. 378, 381.

The Facts and Proceedings.—The same examined and considered with a view of demonstrating that no Federal Question is presented.

The Grand Jury of the County of New York, on November 29, 1911, found, and filed in the Court of General Sessions of the County of New York, an indictment against the plaintiff-in-error, charging him with the crime of "FORGERY IN THE SECOND DEGREE, AS A SECOND OFFENSE", to which indictment the plaintiff-in-error, on December 5,

1911, entered a plea of "not guilty." (Record, p.).

The prior conviction—which, in accordance with the practice and procedure of the State of New York, was alleged in the indictment (People *v.* Sickles, 156 N. Y. 541; People *ex rel.* Cosgriff *v.* Craig, 195 N. Y. 190, 194; People *v.* Rosen, 208 N. Y. 169, 171)—was had in a Federal Court and was for a Federal offense—selling and having in possession, with intent to defraud, etc., counterfeit coin (U. S. Rev. Stat., §5457). The prior conviction was had in 1896, on a plea of guilty, and by the judgment rendered thereon the prisoner was sentenced to imprisonment in a state prison for 3½ years. He served his sentence.

The case came on for trial before the said Court of General Sessions in January, 1912, and, before a jury was impaneled, counsel for the plaintiff-in-error *conceded*, and placed upon the record an admission, that the prisoner at the bar had been previously "convicted" and sentenced and had served his term of imprisonment, as alleged in the indictment, and he thereupon produced and put in evidence before the trial judge, and read into the record, a pardon granted by the President of the United States for said offense, and, "as a preliminary" (Record, pp. 7-8, 10) to a motion which he made, stated that the United States Constitution Article 2, Section 2, provided that the President shall have power to grant reprieves and pardons for all offenses against the United States, except in cases of impeachment. (Record, p. 10).

1. Counsel for the plaintiff-in-error moved that the Court strike from the indictment the al-

legation which charged the prisoner as for a second offense, and to strike from the indictment all the allegations therein contained relating to the prior conviction, and requested the Court to order and direct that the case proceed as a prosecution for a first offense. This motion was made upon the stated ground:

> "that that offence [*i.e.* the prior offense] if committed, had been entirely wiped out and obliterated and nullified by the action of the President of the United States, who, in the granting to the defendant of a full pardon for the offence with which he was charged in the Federal Court, thereby removed from this defendant the disabilities and stigma of such first conviction." (Record, p. 6).

The prisoner's counsel stated that the procedure which he adopted was in the nature of a plea of confession and avoidance; and while such procedure was not in accordance with that prescribed by the law of New York, it appears to have been acquiesced in and permitted by counsel for the prosecution and by the trial court. (Record, p. 7).

The Court said:

> "I shall receive the pardon, and later, when the jury is impaneled, I shall explain to the jury the effect, if any, which the pardon has on the first conviction." (Record p. 9). [*Id. pp.* 19, 24].

The PARDON read as follows:

> "Whereas, Charles Carlesi was indicted in the United States Circuit Court for the Southern District of New York, for selling and having in possession counterfeit silver dollars, in violation of Section 5457 of the

Revised Statutes of the United States, pleaded guilty, and on January 3rd, 1896, was sentenced to imprisonment for three and one-half years in the Monroe County Penitentiary at Rochester, New York, and to pay a fine of One dollar; and

Whereas, he served his term of imprisonment, and after earning all allowances for good conduct, was discharged September 10th, 1898, and since his discharge has conducted himself in an exemplary manner;

Now, Therefore be it known that I, Theodore Roosevelt, President of the United States of America, in consideration of the premises, and divers other good and sufficient reasons, me thereunto moving,

Do hereby grant unto the said Charles Carlesi a pardon to ‡restore his civil rights."

[It is signed and sealed and dated October 3, 1904]. (Deft's Ex. A, Record, pp. 9, 28).

Counsel stated that the authority for his motion —that is, not for the method of procedure which he adopted, but for the substantive relief which he sought by the ruling which he requested the trial court to make—was to be found "*in the United States court decisions.*" He argued the matter at length, quoted from the opinions of this court in several cases, particularly *Ex parte Garland* (4 Wall. 333, 380), respecting the nature and effect of a pardon granted by the President, and said:

"The point that I make is that this having been a Federal offense, or an offense against the laws of the Federal Government by this

‡We desire to call the Court's attention to the fact that the pardon is correctly set forth at the end of the case (Record, p. 28) and that it is incorrectly set forth at that part of the record where it was read by counsel for the plaintiff-in-error (*Id.* p. 9). We have examined the original pardon and shall produce it for inspection by the Court, if necessary. It reads "*to* restore his civil rights."

> defendant, for which he was convicted, and that the President of the United States had pardoned that, under the decisions of the Courts of the United States, that pardon obliterated all his guilt, so that, in construing the law bearing upon this proposition, the application of the principles of law must come, not from the State adjudication, but must come from the Federal adjudications, which declare the force and effect and operation and power of the Chief Executive's pardoning prerogative" (Record, p. 11).

His motion was, therefore, apparently based upon the proposition that, under the decisions of this court which he cited, and from which he quoted, a conviction for an offense against the laws of the United States could not be deemed to be any longer *in existence* after the issuance of a pardon by the President of the United States, and that such a conviction was not, therefore, *within the purview and contemplation of the statutes of New York* providing for an increased punishment for persons convicted of crime who had theretofore been "convicted" of crime (N. Y. Penal Law, § 1941 *ante*, p. 3).

Thus, the following occurred:

Mr. Levy:

> "Now, if the Supreme Court of the United States says, as it has said, that the act of the President of the United States has wiped out and destroyed and nullified every act of criminality that this man was guilty of, and has restored him to his civil rights, can you tell me how in reason it can be argued that the Legislature of the State of New York, by passing this so-called second offense law, can create a higher grade of punishment against this man, that the Supreme Court of

> the land has said shall not exist against him? And it has been said that the allegation as to a second offense is an essential ingredient of his criminality in the matter, but the United States Supreme Court says there has been no criminality, because it is destroyed, wiped out, and pardoned. Now, if it is destroyed, wiped out and pardoned, how can the District Attorney allege an indictment which contains within it an ingredient which the Supreme Court of the land says should not be there? There is the situation with regard to that. Now, let me tax your patience just a trifle further, if your Honor please" (Record, p. 12).

After some colloquy between the Court and counsel:

> "*The Court*: *There must be a first offense in existence.*
>
> "*Mr. Levy*: *That is the point exactly. Now, the point I take is, and your Honor has stated it concisely and properly, there must be a first offense in existence,* and says, the United States Supreme Court, that first offense is wiped away. Now if that be so, that exemplifies the force of the point that I am attempting to make" (Record, p. 12).

The language of Mr. Justice Field in *Ex parte Garland*, which formed the basis of the application of the plaintiff-in-error, was as follows. We quote it from the Report (4 Wall. 333, 380). Speaking of the power conferred by the Constitution upon the President to grant reprieves and pardons for offenses against the United States the learned Justice said:

> "The power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either

before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.

"Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction it prevents any of the penalties and disabilities consequent upon conviction from attaching; *if granted after conviction, it removes the penalties and disabilities* and restores him to all his civil rights; it makes him as it were, a new man and gives him a new credit and capacity."

The Trial Court, however, followed the decisions of the Court of Appeals of New York—*People* v. *Price*, 119 N. Y. 650; 53 Hun, 185—which held that a pardon *did not disprove "the fact of conviction"* and that a subsequent offender could be prosecuted as for a second offense notwithstanding the fact that he had received a pardon for the prior offense, a "conviction" for which was made the basis for such a prosecution and for the increased punishment prescribed for crimes as second offenses by the statutes of New York. In other words the Court construed the statute to include within its scope a conviction whether the convict had been subsequently pardoned or not—holding that it was the "fact of conviction" that was made descriptive of the offense.

The Trial Court denied the motion and counsel for the plaintiff-in-error took an EXCEPTION (Record, p. 19). The Trial Judge stated that he would instruct the jury in the matter at the proper time (Record, pp. 19, 20).

The jury having been empaneled and sworn, counsel for the prosecution opened the case and the concessions respecting the prior conviction and the pardon were considered to have been repeated as if made *in extenso*, an EXCEPTION being reserved to the prisoner (Record, pp. 24-26).

At the close of the case for the prosecution, counsel for the plaintiff-in-error stated:

> "If your Honor please, so as to preserve the record, I deem it my duty at this time to renew the motion made at the beginning of the case, to take from the consideration of the jury the question of a second offense upon the grounds stated then."

The motion was denied and an EXCEPTION taken (Record, p. 26).

The pardon was received and read in evidence (Record, pp. 28-29).

The Trial Court, in charging the jury, stated that the prior conviction alleged in the indictment was conceded and that the defendant [the plaintiff-in-error] had offered in evidence a pardon granted by the President of the United States for the prior offence. He carefully instructed the jury that the fact of the prior conviction was not

to be considered by them in determining the question whether the accused had committed the act of forgery charged in the indictment and that it had no bearing upon that question.

He referred to the English practice, under which the fact of a prior conviction is ascertained after the rendition of the verdict, and pointed out that in the State of New York the practice required it to be alleged in the indictment and found by the jury, at the same time explaining to the jury that it went to the punishment only, and further saying:

> "* * * * You are therefore to consider the prior conviction solely and only for the purpose of determining whether or not the defendant was heretofore convicted of a crime, and if you so find, and if you find the defendant guilty of the forgery of the $3,200 check, you will convict the defendant of forgery in the second degree as a second offense." (Record, p. 31).

At the conclusion of the charge to the jury the following occurred:

> "*The Court*:
>
> "I have received the following request: I ask your Honor to charge the jury that the pardon of the President of the United States granted to the defendant herein, of the crime of selling and having in possession counterfeit money of the United States, of which the defendant was convicted, and which is charged in the indictment herein as the first offense, reached the punishment prescribed therein and blotted out of existence the guilt of the defendant, so that in the eye of the law the defendant now is as innocent as if he had never committed the offense, charged in

the indictment herein as the first offense, and that the said pardon removed all the penalties and disabilities attaching upon such conviction and restored the defendant to all his civil rights, and that the jury, therefore, cannot consider such conviction as and for the first offense herein.

"Some of the things stated in your request, Mr. Levy, should have been subdivided.

"*Mr. Levy.*—I follow the language there, your Honor, in this case I had.

"*The Court.*—For instance, I shall charge the jury, so far as the pardon is concerned, that the defendant is entitled to all his civil rights under that pardon.

"*Mr. Levy.*—Yes, sir.

"*The Court.*—And that because of the pardon the jury are not to consider the second offense—I decline to charge that and give you the benefit of an EXCEPTION." (Record, pp. 37-38).

Thus, we submit that the question presented to the Trial Court for decision was *not* the "*validity*" of the statute of, or of the authority exercised under the State of New York, and that the plaintiff-in-error did not "draw in question," the "validity" of such statute or authority "upon the ground of their being repugnant to the constitution, treaties or laws of the United States."

The claims advanced by the motion and argument were merely, we submit, that the Court should hold that there was no prior conviction in existence which could be made the basis of a prosecution of the plaintiff-in-error for the crime

of forgery as a second offense, in view of the *obiter* remarks contained in opinions of this court claimed to mean that a pardon wiped out, obliterated and destroyed a conviction and the fact of prior criminality as evidenced thereby, and, hence, created a situation the same as if the prior conviction had never existed. In other words, the court was in effect requested to rule that there was no prior "conviction", within the intent of the statute, and hence no occasion for the application of §1941 of the Penal Law of New York. That, we submit, was the extent of the ruling requested; and a denial of the correctness of the contention was the extent of the rulings made. And that, we submit, does not present a Federal question within the meaning of §237 of the Judiciary Code.

The provision of the Federal Constitution (Art. II, §2) was referred to merely as showing the President's *power to grant the pardon*, and, hence, as showing *the validity of the pardon*. The courts of New York did not deny the validity of the pardon, but on the contrary recognized its validity. The question presented to the Trial Court was merely whether the Court, in determining whether or not there was a previous conviction (within the meaning and purview of the statute) should construe the general *obiter* remarks of Mr. Justice Field in *Ex parte Garland*, expressed under circumstances and with respect to a question totally different from that involved in the case at bar, to be authority for the proposition that there was not, or should follow the decisions of the courts of New York respecting the effect of a pardon, as bearing on the meaning of the word "conviction", rendered in cases dealing with and deciding a question similar to that involved in the pending case.

The claims advanced, we submit, did *not* go to the *validity* of the statute of or authority exercised under the State, but related merely to the evidential effect that should be given to the previous conviction, followed by a pardon, and the evidential effect of a pardon, in the light of the opinions of the courts to which reference was made.

We do not dispute that the construction given by the Federal tribunals to the Constitution and Laws of the United States is received as the true constitution; but the question in this case was not the construction of a provision of the Federal Constitution, but the meaning and scope of the word "conviction" in the state statute.

2. Passing to a consideration of the facts and proceedings for the purpose of ascertaining whether any "right, privilege, or immunity", "under the Constitution of the United States" was "especially set up and claimed" by the plaintiff-in-error, and whether there was "*a decision*" "*against*" any such right, privilege, or immunity, especially *set up and claimed*, it appears that the only right, privilege, or immunity, if any, which the plaintiff-in-error asserted, was that he should not be visited with any penal consequences of his prior conviction for his offence against the laws of the United States.

Thus, in the course of the argument of his motion, counsel quoted from *United States* v. *Klein*, (13 Wall. 128, 147) as follows:

> "To the executive alone is entrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offence pardoned and *removes all its penal consequences.*"

After which he said:

> "Now, I urge that, while it may be true that the Legislature of the State of New York, which provided for a charge as for a second offence, intended that it should affect the punishment only, nevertheless, **if** *the punishment which the Court would have to consider in case of a conviction is a penal consequence of his first offence,* it cannot be said, if your Honor please, that a man charged with crime can approach the bar of justice with that same degree of security, if he is charged as a second offender." (R. p. 13).

We submit that the right, privilege, or immunity claimed by the plaintiff-in-error by reason of the pardon was *not denied*: that the decision was not *against* any *Federal right* "set up and claimed".

The plaintiff-in-error was prosecuted for an offence against the law of New York, and the prior "conviction" was merely used as a fact—a conceded fact—in his past history as bearing upon the punishment to be inflicted solely for his later offence against the law of New York. The increased punishment, as the authorities uniformly hold (Graham *v.* West Virginia, 224 U. S. 616), is not inflicted for the former crime, and is not a penal consequence thereof.

It is true that the Trial Court held and decided that the pardon for the former offence did not exempt the plaintiff-in-error from the increased punishment prescribed for crimes as second offenses, that it did not disprove the fact of conviction, but that decision, we submit, did not involve a "Federal question," but involved merely a

question of the interpretation and application of the New York statute—a question of local law.

3. The judgment of conviction was affirmed by the Appellate Division of the Supreme Court of New York. The opinion of that court was written by Mr. Justice Miller and is reported in 154 App. Div., 481. A concurring opinion was written by Mr. Justice Laughlin (154 App. Div., 481, 487).

The judgment was subsequently affirmed by the New York Court of Appeals, which adopted the opinion of Mr. Justice Miller as its own (208 N. Y., 547).

The point made by the plaintiff-in-error before the Appellate Courts of the State of New York was, as stated in the opinion of Miller, J., "that the prior conviction could not after a pardon be the basis of a conviction of a subsequent crime as a second offence" (Record, p. 43).

The Court pointed out in its opinion that the proposition was *based upon the language of Mr. Justice Field in the case of Ex parte Garland,* which it quoted (Record, p. 44; 154 App. Div. 481, 485); and, after referring to several cases bearing upon the effect of a pardon upon a prosecution for a subsequent offense, said, with reference to the *Price* (119 N. Y. 650; 53 Hun 185) case:

> "But the appellant seeks to distinguish that case by the fact that the pardon for the first offense was granted by the Governor of the State of Georgia, and that the decision was put upon the ground that the Legisla-

ture of the State of New York was not controlled by the Constitution or laws of the State of Georgia. While that point was made by Mr. Justice Landon, writing for the General Term, his opinion, which was adopted by the Court of Appeals, put the decision on a much broader ground, namely, that the conviction was not obliterated by the pardon but remained as a fact in the past history of the defendant and that the punishment for the second offense was solely for that and not at all for the offense committed in Georgia; and, necessarily, the latter proposition is correct, else all the statutes providing for increased punishment for second offenses would be unconstitutional (see *Peo. ex rel. Cosgriff* v. *Craig*, 195 N. Y., 190).

"Manifestly, the language of Mr. Justice Field, quoted *supra*, is to be read in its bearing upon the precise point before the Court. The pardon of this defendant did not 'make a new man' of him, it did not 'blot out' the fact or the record of his conviction, and of course, the Supreme Court, in deciding that the Congress could not infringe upon the pardoning power of the executive did not intend to hold that the executive could blot out a solemn record of the judicial branch of government. (See *Roberts* v. *State of New York*, 30 App. Div., 106, 160 N. Y. 217.) The pardon in this case merely restored the defendant to his civil rights. If it had been granted before his term of imprisonment had been served, it would also have relieved the defendant of that. But it did not obliterate the record of his conviction or blot out the fact that he had been convicted (*Matter of* *, *an Attorney*, 86 N. Y., 563). It relieved the defendant of the consequences which the law attached to his offense. But the defendant is to be punished

* Anonymous, name omitted in opinion.

now solely in consequence of his second offense. The fact of the former conviction is an element merely in determining the criminality of the second offense (*Peo.* v. *Sickles*, 26 App. Div. 470, 156 N. Y., 541; *Peo. ex rel. Cosgriff* v. *Craig, supra*). The Legislature of this State has said that one who commits a crime, after having been convicted of another crime, is a greater offender than as though he had not previously been convicted, and the punishment inflicted is solely for the second offense to which a greater degree of criminality is thus attached. That degree of criminality is not at all lessened by the fact of a pardon which assumes his guilt, remits the punishment and affords him an opportunity to become a law-abiding citizen. It was solely within the province of the Legislature to attach such greater criminality to the second offense from the mere fact of a conviction for a first, and the executive by the exercise of the pardoning power could no more interfere with that exercise of legislative power than the Legislature could interfere with the power to pardon" (Record, pp. 44-45).

The decision of the Appellate Courts, likewise, we submit, decided the case on grounds of State law, and not with reference to any Federal question, apparently realizing that no such question was involved. The case of *Ex parte Garland* was referred to in the opinion of the State Courts merely to point out that that case had no application to the situation involved, or to the point made, in the case at bar (*vid.* Osborne *v.* Clarke, 204 U. S. 565, 568).

However, if it be assumed that the plaintiff in error—by the motions which he made and by the

rulings and instructions which he requested—(1) "drew in question" (*a*) the "validity" of the statute of New York, upon the ground of its repugnance to the Federal Constitution—if such statute were construed to warrant the infliction of increased punishment for the later crime, whether the former offence had been pardoned or not—and (*b*) that the necessary effect, in law, of the rulings and judgment of the State courts was to decide "in favor of the validity" of the statute, so construed, and to decide that it was not repugnant to the Federal Constitution, and (*c*) that such a decision was necessary to maintain the judgment; or if it be assumed (2) that (*a*) there was a decision —either expressly or by necessary implication— against a Federal right, privilege or immunity specially set up and claimed under the Federal Constitution, and (*b*) that the validity of the judgment depended upon the decision with respect thereto—and that, hence, this Court is clothed with jurisdiction in the premises:

We contend that the rulings and judgment of the State courts were correct and afford no ground either for a reversal or modification ‡ of the judgment by this Court, and we shall, therefore, upon the assumption that a Federal question is involved, proceed to a consideration of the case on the merits; and we desire respectfully to say that the State of New York, in view of the conflicting views in various states upon the broad question involved, prefers a decision by this Court upon the merits, in order that the question may be finally set at rest.

‡ If the Court should disagree with our contentions, a modification of the judgment, making the punishment as for a first offense, is, we submit, all that would be required.

POINT II.

The Pardon of the "Former Offense" by the President does not Relieve the Plaintiff-in-error from Liability to the Increased Punishment Prescribed for "Second Offenders."

The Theory of a Prosecution for a Crime as a Second Offense.

It is important to bear in mind the theory upon which a prosecution for a crime "as a second offense" proceeds, or upon which an increased punishment is imposed upon a person convicted of a crime who has, before the commmission of the act constituting the later crime, been convicted of an offense.

We state the proposition in both forms for the reason that in some of the states, as in England, the ascertainment of the fact of the prior conviction is made in a separate proceeding or inquiry instituted after the conviction (by plea or verdict) for the later crime; while in other states, including the State of New York, the prior conviction must be alleged in the indictment as a part of the charge against the defendant, and given in evidence before the jury as a fact in his past history, which, if found, increases the grade or magnitude of his later crime and renders him liable to an increased punishment therefor.

It is the second offence *alone* that is punishable and that is punished, but the prior conviction, whether it be alleged in the indictment and found by the jury as an ingredient of the crime charged

"as a second offense," or ascertained after the plea or verdict, goes to the degree of punishment which may be inflicted for the later crime.

The increased punishment is *not* inflicted for the former crime or criminal act. The idea is—that the fact of conviction increases the magnitude of his *later* crime or criminal act.

Graham *v.* West Virginia, 224 U. S. 616, 623 [and cases there cited].
McDonald *v.* Massachusetts, 180 U. S. 311; aff'g McDonald *v.* Comm., 173 Mass. 322;
Moore *v.* Missouri, 159 U. S. 673, 676; aff'g 121 Mo. 514;
People *ex rel.* Cosgriff *v.* Craig, 195 N. Y. 190, 194;
People *v.* Sickles, 156 N. Y. 541, 547;
People *v.* Raymond, 96 N. Y. 38;
People *v.* Price, 53 Hun, 185, 189; 119 N. Y. 650;
People *v.* Reilly, 49 App. Div. 218; aff'd 164 N. Y. 600;
Ross's case, 2 Pick. [19 Mass.] 165, 171;
People *v.* Stanley, 47 Cal. 113;
People *v.* Coleman, 145 Cal. 609.
Rand *v.* Comm., 9 Gratt [Va.] 738.
Ingalls *v.* State, 48 Wisc. 647.
Mount *v.* Comm., 2 Duv. [Ky.] 93.
Herndon *v.* Comm., 105 Ky. 197.

In *Graham* v. *West Virginia* (224 U. S. 616, 623) this Court said, *per* HUGHES, J.:

> "The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of crim-

inal conduct aggravates their guilt and justifies heavier penalties when they are again convicted. Statutes providing for such increased punishment were enacted in Virginia and New York as early as 1796, and in Massachusetts in 1804; and there have been numerous acts of similar import in many States. This legislation has uniformly been sustained in the state courts (*Ross's Case*, 2 Pick. 165, 170; *Plumby* v. *Commonwealth*, 2 Met. 413, 415; *Commonwealth* v. *Richardson*, 175 Massachusetts, 202, 205; *Rand* v. *Commonwealth*, 9 Gratt. 738, 740, 741; *King* v. *Lynn*, 90 Virginia, 345, 347; *People* v. *Stanley*, 47 California, 113; *People* v. *Coleman*, 145 California, 609; *Ingalls* v. *State*, 48 Wisconsin, 647; *McGuire* v. *State*, 47 Maryland, 485; *State* v. *Austin*, 113 Missouri, 538), and it has been held by this court not to be repugnant to the Federal Constitution. *Moore* v. *Missouri*, 159 U. S. 673; *McDonald* v. *Massachusetts*, 180 U. S. 311."

"In the *McDonald Case*, the statute (Mass. St. 1887, c. 435, § 1) provided that whenever one had been twice convicted of crime and committed to prison in Massachusetts, or in any other State, he should, upon conviction of a subsequent felony, be deemed to be an 'habitual criminal' and should be punished by imprisonment for twenty-five years. In delivering the opinion of the court, Mr. Justice Gray said (p. 312):

'The fundamental mistake of the plaintiff in error is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished in Massachusetts and in New Hampshire.

'But it does no such thing. * * * The punishment is for the new crime only, but is the heavier if he is an habitual criminal. * * * The allegation of previous convictions is not a distinct charge of crimes, but

> is necessary to bring the case within the statute, and goes to the punishment only.' "

In *Moore* v. *Missouri* (159 U. S. 673, 676) this Court, speaking of the provisions of the statute of Missouri, providing for increased punishment for subsequent offenses, said:

> "Similar provisions have been contained in state statutes for many years, and they have been uniformly sustained by the courts. In the opinion of the Supreme Court of Missouri it is said: 'The increased severity of the punishment for the subsequent offense is not a punishment for the same offense for the second time, but a severer punishment for the subsequent offense, the law which imposes the increased punishment being presumed to be known by all persons, and to deter those so inclined from the further commission of crime; and we are unable to see how the statute which imposes such increased punishment violates the provisions of our constitution hereinbefore quoted. . . . The fact that the indictment charged a former conviction of another and entirely different offense, is not in fact charging him with 'an offense with respect of the former offense in the case in hand. The averments as to the former offense go as to the punishment only."

In *McDonald* v. *Mass.* (180 U. S. 311) this Court said:

> "The fundamental mistake of the plaintiff-in-error is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished in Massachusetts and in New Hampshire.
>
> But it does no such thing. * * * The punishment is for the new crime only, but is the

> heavier if he is an habitual criminal. * * * It is within the discretion of the legislature of the State to treat former imprisonment in another State, as having the like effect as imprisonment in Massachusetts, to show that the man is an habitual criminal. The allegation of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute, and goes to the punishment only" [p. 312].

This is succinctly stated by the Supreme Court of Massachusetts in *Ross's case* (2 Pick. 165), where the Court said:

> "But in our view the punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself" [170].

In *People ex rel. Cosgriff* v. *Craig* (195 N. Y. 190), the Court quoting from the *Sickles* case (156 N. Y. 541) said that the previous conviction

> "aggravates the guilt of the prisoner and, as a hardened, or unreformed, criminal, subjects him to an increased punishment for the repeated crime" [p. 194].

It has been uniformly held that statutory provisions such as are here involved

1. Are not void as *ex post facto* laws even though the former conviction was had prior to the enactment of the statute permitting the increased punishment.

> McDonald *v.* Mass., 180 U. S. 311, 313.
> Comm. *v.* Graves, 155 Mass. 163, 164,
> Ross's case, 2 Pick [19 Mass.] 165, 169,
> In *re* Miller, 110 Mich. 676,
> Ex parte Gutierrez, 45 Cal. 429,

Rand *v.* Comm., 9 Gratt. [Va.] 738,
Blackburn *v.* State, 50 Ohio St. 428,
People *v.* Raymond, 32 Hun [N. Y.] 123; aff'd 96 N. Y. 38.

2. Are valid as against objections that they impose cruel and unusual punishments.

Moore *v.* Missouri, 159 U. S. 673, 677,
People *v.* Stanley, 47 Cal. 113,
People *v.* Hodgson, 66 Vt. 134,

See also:

In re Kemmler, 119 U. S. 436.
Leeper *v.* Texas, 139 U. S. 467.

3. Do not infringe constitutional provisions against double jeopardy—the increased punishment being inflicted solely for the later crime which is aggravated by the fact of the prior conviction.

Graham *v.* West Virginia, 224 U. S. 616.
Moore *v.* Missouri, 159 U. S. 673, 677,
McDonald *v.* Massachusetts, 180 U. S. 311, 313,
People *v.* Sickles, 156 N. Y. 541, 548.
Kelly *v.* People, 115 Ill. 583,
Ingalls *v.* State, 48 Wis. 647,
People *v.* Lewis, 65 Cal. 401,
People *v.* Coleman, 145 Cal. 609,

4. Are valid as against objections that they impose a penalty on crimes committed outside the jurisdiction.

McDonald *v.* Mass., 180 U. S. 311; aff'g. 173 Mass. 322.
People *v.* Caesar, 1 Park. Cr. Rep. [N. Y.] 645, 648.

5. Do not deny the equal protection of the laws or due process of law.

Moore *v.* Missouri, 159 U. S. 673.
McDonald *v.* Mass., 180 U. S. 311.

All these decisions necessarily indicate that the increased punishment is in no sense a penal consequence of the former conviction, and an application of the principles that underlie the decisions would seem to lead inevitably to the conclusion that a pardon of the prisoner for the former offense, after a conviction therefor, would not operate to relieve him from liability to the increased punishment prescribed—and so it has been held.

It is immaterial whether the "former offence," of which the defendant was convicted, was pardoned or not.

Before we consider the cases in the state courts in which this question has been specifically decided, we desire to point out that in some states a discharge from imprisonment under the judgment of conviction, either *by pardon* or by the service of the term of imprisonment, is expressly made a condition precedent to the imposition of an increased punishment for a subsequent offense—a fact which clearly negatives the idea that a pardon for the prior offense relieves from liability to the increased punishment for a subsequent one (Am. & Eng. Ency. of Law [2nd Ed.], Vol. 8, p. 492).

In Missouri, the statute—Missouri Rev. Stat., §3959—provides that if a convicted person "shall be discharged, either *upon pardon* or upon compliance with the sentence, and shall subsequently

be convicted of any offense committed after such pardon or discharge", he shall be liable to an increased punishment. The Missouri statute was quoted by this court in *Moore v. Missouri* (159 U. S. 673, 676), and, although the precise question here involved was not under consideration, the validity of the statute was sustained.

See also:

State *v.* Manicke, 139 Mo. 545, 547, 548.
State *v.* Austin, 113 Mo. 538.

In Massachusetts, under statutes providing for additional punishment on convicts who had been discharged from former sentences "in due course of law", it was held sufficient to aver in an information for such punishment that the convict had been discharged from a former sentence "in consequence of a pardon."

Mass. Laws 1832, C. 73; 1833, C. 85,
Evans *v.* Comm., 44 Mass. 453.

The earlier statute of New York on the subject —2 Rev. Stat. 699 §8—required, as a basis for the increased punishment for a second offense, that the defendant should have been discharged, "either upon being pardoned or upon the expiration of his sentence", and the fact of such pardon for the prior offense had to be pleaded and proved. So that, instead of exempting a second offender from increased punishment, the pardon was, in a sense, essential to render him liable thereto.

2 Rev. Stat. [N. Y.] 699, §8.
Wood *v.* People, 53 N. Y. 511, 513.
Johnson *v.* People, 55 N. Y. 512.

The fundamental idea underlying legislation of that character was that penal discipline was reformatory in its nature and purpose, and that one who had been subjected thereto and had been released, either upon the expiration of his term or by pardon, ought to have benefited by the experience and to have abstained from criminal conduct in the future, so that, if he lapsed into crime, both his moral and legal guilt was greater—and hence the advisability of imposing greater penalties on him and others, similarly situated, for future criminal conduct. Indeed, it may be said that the moral guilt of one who commits an offence after a pardon for a previous offence is *greater* than that of one who was never pardoned. The experiences of common life indicate that this is a truism. And, even if the person was innocent of the former offence, he ought likewise to have profited by the warning and if he failed to abstain from crime he cannot justly complain of the situation in which he finds himself if he is again convicted.

In the following cases it was specifically held that a pardon for the prior offense did not relieve the prisoner from liability to the increased punishment:

Mount *v.* Comm., 2 Duv. [Ky.] 93, 95.
Stewart *v.* Comm., 2 Ky. Law Rep. 386,
Herndon *v.* Comm., 105 Ky. 197,
People *v.* Price, 53 Hun [N. Y.], 185; 119 N. Y. 650.

In *People* v. *Price* (119 N. Y. 650; 53 Hun, 185), the defendant had been convicted in the State of Georgia of a felony. He was pardoned by the

Governor of Georgia. He was subsequently tried and convicted in New York for the crime of grand larceny in the first degree *as a second offense.* It was held that the pardon did not exempt him from liability to conviction and punishment as a second offender.

The General Term of the Supreme Court, the opinion of which (53 Hun, 185) was adopted by the Court of Appeals (119 N. Y. 650), said:

> "The trial court refused to hold that the pardon granted the defendant by the governor of the State of Georgia exempted him from liability to conviction here as for a second offense. The court held that **the pardon did not disprove the fact of conviction** in the State of Georgia, but was consistent with it, and hence the defendant might be lawfully convicted under section 688 of our Penal Code, notwithstanding the pardon. The question does not appear to have been decided in this State. The defendant relies upon the principles announced in *Ex parte Garland* (4 Wall., 380). The court there held that "a pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense." This broad doctrine is reiterated in subsequent cases. (*U. S.* v. *Padelford,* 9 Wall., 531; *Carlisle* v. *U. S.,* 16 *id.,* 147; *Osborn* v. *U. S.,* 91 U. S., 478.) Of course, past acts cannot be obliterated, but the legal effects of them can be. It remains true that the defendant was **convicted** in the State of Georgia, although subsequently pardoned, and hence it is urged that the defendant still remains in the class described in sec-

tion 688 of our Penal Code,‡ as one 'having been convicted under the laws of another State.'

"Section 692 of the Penal Code provides that a pardon which shall relieve from a judgment of habitual criminality shall not prevent a subsequent judgment of habitual criminality upon subsequent conviction for felony. This, at first, seems to be an exception, and to imply that only with respect to habitual criminals is previous pardon made inoperative; but it is obviously inserted, because needed with respect to habitual criminals, but not needed in the cases mentioned in section 688, because there **the fact of previous conviction is made descriptive of the renewed offense, irrespective of the fact of pardon.**

The cases cited from the Supreme Court of the United States hold that, since the pardoning power is conferred upon the executive by the Constitution, it is not within legislative control or restriction, and hence the legislature cannot diminish the full absolution which the pardon imports. Assuming this to be true, the result would be that the legislature of the State of Georgia could not impair the force of the pardon which, under the Constitution of that State, her governor grants. The same reasoning would apply to the legislature of the State of New York with respect to a pardon granted by the governor of New York, but does not touch the phase of the case here presented. The police power of every State is complete, except as restrained by her own or the Federal Constitution. **No constitutional provision restrains the legislative power of New York from prescribing that where persons have been convicted for felony in another State, whether subsequently pardoned or not, they shall, upon subsequent conviction of a felony in this State, be more severely punished.**

‡Now Penal Law § 1941.

That the power exists is clearly inferable from the extent of the police power as defined by the Supreme Court of the United States. (*Railroad Co.* v. *Husen*, 95 U. S., 465, 471 and cases there cited; *Bowman* v. *Chicago, etc., Railway Co.*, 125 *id.*, 465, 492.) Our own courts recognize the fact that a moral stigma rests upon a convict notwithstanding his pardon. (*Matter of*‡ , *an Attorney*, 86 N. Y., 563; *People* v. *Eighmy*, 78 *id.*, 333.) **The fact of conviction is a part of his past history.** (*People* v. *Raymond*, 96 N. Y. 41). **In none of the cases in the Supreme Court of the United States was the pardoned person on trial for a second offense.** His pardon proved effectual to exempt him from the penalty incurred either under a prior or subsequent law. **Here no penalty is incurred for the offense committed in Georgia, but a double penalty is inflicted upon the repetition here of the like offense.**

We conclude, therefore, that the fact of the defendant's conviction for a felony under the laws of the State of Georgia was properly alleged and proved, and that the pardon did not exempt him from the increased punishment prescribed for a second offense."

People *v.* Price, 53 Hun, 185, 187, 188, 189, 119 N. Y. 650.

In *Mount* v. *Comm.*, 2 Duv. [Ky.] 93, the Court of Appeals of Kentucky in considering the effect of a pardon upon punishment for a second offense, said:

"The pardon relieved the convict of the entire penalty incurred by the offense pardoned and nothing else or more. It neither did nor could relieve from any penal consequence resulting from a *different offense* committed after the pardon and never pardoned.

‡Anonymous name omitted in opinion.

> The increased punishment prescribed by statute for the subsequent offense was no part of the penal consequences of the first offense but applied exclusively to the last as aggravated by its repetition of the same crime. The legislature, as required by justice and policy, ought to have provided a severer punishment for repeated than for only one crime; and whether it had done so by duplicating for a second offense the punishment of the first, or by any other measure of augmentation, cannot be material. In any aspect the augmented punishment is for the last and not at all for the first offense; and, of course, a pardon of the first could in no way or degree operate as a pardon of the last offense or remission of any portion of the punishment denounced for perpetration of it" [p. 95].

This case was followed by the same court in *Stewart* v. *Comm.* (2 Ky. Law Rep., 386), and in *Herndon* v. *Comm.* (105 Ky., 197; 88 Am. St. Rep., 303), where the above extract from the opinion was quoted. A contrary view was taken by the Virginia courts in *Edwards* v. *Comm.* (78 Va. 39; 49 Am. Rep., 377) and by the Ohio courts in *State* v. *Martin* (59 Ohio St. 212; 69 Am. St. Rep., 762) induced, we submit, by a misconception of the broad language of *Ex parte Garland* and by the erroneous view that a pardon blotted out and annulled the fact of conviction, and that the increased punishment for the second offense was a penal consequence of the prior conviction—a notion that is, we submit, not only erroneous, but which, if accepted, would render the statutes unconstitutional under "second jeopardy" provisions, as the Courts pointed out in this case (154 App Div. 481, 486; 208 N. Y. 547; Record, p. 45).

In the note to the case of *Re Miller* in 34 L. R. A. at p. 403, the annotator, speaking of the decision of the Kentucky court in the *Mount* case, (*supra*) and criticizing the decision of the Virginia court in the *Edwards* case (*supra*) says—we quote the passage as it represents the views of a disinterested critic:

> "It is plain that the reasoning of the Kentucky court is in harmony with all the decisions which sustain these statutes against constitutional objections, as they all proceed on the theory that the enhanced penalty is not in any sense a new punishment for the prior offense. If it were the statutes would violate the constitutional provisions considered at the beginning of this note [*i. e.* provisions against second jeopardy, etc.]. But if the statutes are to be upheld on the ground that the enhanced penalty is not a new or additional punishment of the prior offense‡ a pardon of that offense does not relieve from that penalty. The admirable statement of the matter by the Kentucky court, which is above quoted, seems to be conclusive."

In Am. & Eng. Ency. of Law, 2nd Ed. Vol. 24 pp. 585, 587 it is said:

> "While a pardon absolves its recipient from guilt and removes the penal consequences of his crime it does not affect the fact that he has been guilty. In other words, **a pardon operates prospectively only, and has no retroactive effect; it does not annul the judgment or conviction or affect its lawfulness.** Expressions of judicial opinion are to be found, however, to the effect that in legal contemplation a pardon works an absolute obliteration of the offense itself; and is in effect a reversal of the judgment,a verdict of acquittal

‡As they uniformly have been.

and a judgment of discharge thereon, at least to the extent that it gives rise to a complete estoppel of record against further punishment *pursuant to the conviction.* In cases dealing with cumulative punishment this theory has been adopted by some courts as a basis of decision, but, as will be seen the weight of authority is to the contrary" [p. 585]. * * * *

"Since a pardon cannot affect the conviction or judgment determining the guilt of the offender, the fact of the crime remaining for *judicial consideration* notwithstanding the pardon, and since the additional punishment prescribed by a statute for a second offense is no part of the penal consequences of the first, it appears to be the general rule that a pardoned criminal upon conviction for a repetition of his crime can be subjected to cumulative punishment. There is authority, however, to the contrary" [p. 587].

It has also been held that the prisoner may not even show that the prior conviction was erroneous on his trial for a subsequent offense as a second offender (Kelly *v.* People, 115 Ill. 583; 56 Am. Rep. 184). Collateral attack on a judgment, except for want of jurisdiction, is not permitted (People *ex rel.* Hubert *v.* Kaiser, 206 N. Y. 46; Andersen *v.* Treat, 172 U. S. 24, 31).

It has likewise been held that a pardon does not have the retroactive effect of annulling a conviction—the judicial ascertainment of guilt—from which proposition it flows as a necessary corollary that the fact of conviction remains as a fact in

the past history of the criminal, and notwithstanding that the offender has been relieved from the penal consequences and disabilities that flow from his former criminal act, *so far as the offended sovereignty may relieve him*, the conviction may still be regarded as a fact, and received as such, in aggravation of his later crime.—the theory upon which prosecutions for crimes of second offenses proceed and upon which increased punishment for such offenses is inflicted. Before we discuss the cases bearing upon this proposition we shall consider, somewhat generally, the nature and effect of a pardon.

The Nature and Effect of a Pardon.

In *United States* v. *Wilson*, (7 Pet. [32 U. S.] 150, 160), the Court said, *per* MARSHALL, C. J.:

> "A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed."

This definition of the great Chief Justice has become a classical phrase in judicial quotation [Cyc. Vol. 29 "Pardons" p. 1559 Note 1 where the cases are collected].

In *Osborn* v. *United States*, (91 U. S. 474, 477) the Court said that "the Government can only release what it holds" and that "the constitutional grant to the President of the power to pardon offenses must be held to carry with it, as an incident, the power to release penalties and forfeitures which accrue from the offenses." [p. 478].

In *Young* v. *United States* (97 U. S. 39, 68), the Court said, *per* WAITE, C. J.:

> "A pardon of an offense removes the offending act out of sight; but, if there is no offense in the eye of the law, there can be no pardon. Consequently, the acts which are not extinguished by a pardon remain to confront the actor."

In *Brown* v. *Walker* (161 U. S. 591, 638), FIELD, J., who wrote the opinion in *Ex parte Garland*, said, in a dissenting opinion:

> "The legal exemption of an individual from the punishment which the law prescribes for the crime he has committed is a pardon, by whatsoever name the act may be termed."

In *Knote* v. *United States* (95 U. S. 149), the Supreme Court practically summed up the effect of its former decisions, and said:

> "A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law, it so far blots out the offense that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position. But it does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suf-

> fered, nor does it impose upon the government any obligation to give it. The offense being established by **judicial** proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required" [p. 153].

In the case of *In re Spenser,* (Fed. Cas. No. 13,234; 22 Fed. Cas., 921), DEADY, J., commenting on the language of Mr. Justice FIELD in *Ex parte Garland,* said that it was "probably as strong and unqualified a statement of the scope and efficacy of a pardon as can be found in the books," and continued:

> "And yet I do not suppose the opinion is to be understood as going the length of holding that while the party is to be deemed innocent of the crime by reason of the pardon from and after the taking effect thereof, that it is also to be deemed that he never did commit the crime or was **convicted** of it. The effect of the pardon is prospective and *not* retrospective. It removes the guilt and restores the party to a state of innocence. **But it does not change the past and cannot annihilate the established fact that he was guilty of the offense."** [p. 922].

He points out that such is the doctrine of the authorities cited by the Supreme Court in its opinion, and, after discussing them, continues:

> "From these authorities it is plain that a pardon does *not* operate retrospectively. The offender is purged of his guilt, and thenceforth he is an innocent man; but the past is not obliterated nor the fact that he had committed the crime wiped out. * * * The pardon has absolved him from the guilt of the act, and relieved him from the legal disabil-

> ities consequent thereupon. **But it has not done away with the fact of his conviction.** * * * The fact remains, notwithstanding the pardon, that the applicant was guilty of the crime of perjury * * * ." [p. 923].

In *United States* v. *Athens Armory* (24 Fed. Cas. 878, 884), the Court said:

> " 'A pardon,' says Lord Coke, 'is a work of mercy, whereby the king, either before attainder, sentence or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical. All that is forfeited to the king by any attainder, &c., he may restore by his charter.' 3 Inst. 233rd."

In *United States* v. *Morris* (26 Fed. Cas. 1336, 1346), the Court said:

> "A pardon, as the very term imports, is an act of mercy and favour, and generally supposes its object guilty. A remission, on the contrary, is an act of justice, and cannot be obtained, until the entire innocence of the petitioner be established, not by testimony taken *ex parte*, but after full notice to the proper officer of the government, and to the collector who made the seizure."

A pardon does not annul a judgment of conviction.

In *Roberts* v. *State of New York*, (30 App. Div., 106; 160 N. Y., 217), the general subject of pardons and their effect is discussed at some length. In that case the plaintiff, Roberts, had been convicted in 1877 at Oyer and Terminer of the crime of burglary and sentenced to State Prison for twenty years. After serving nearly two years in prison he was pardoned by Governor Robinson,

and some years thereafter he was restored to the rights of citizenship by Governor Morton. *No appeal was ever taken from the judgment of conviction.* Two days after his restoration to citizenship the legislature passed a law (L. 1895, Chap. 342) which authorized him to present a claim to the Board of Claims "for the damages sustained by him by reason of his improper conviction and imprisonment for the alleged crime of burglary," and authorized the Board of Claims to hear and pass upon the said claim and to award such compensation and damages in consequence of the conviction and imprisonment as should appear to be just and reasonable. Roberts presented a claim for a large amount. He was allowed $7500. Both sides appealed, the State, upon the ground that the plaintiff was not legally entitled to any award. Both the Appellate Division and the Court of Appeals sustained the contention of the State.

The Appellate Division, in its opinion, to which we respectfully refer the Court (30 App. Div 106), discussed the matter at considerable length, stating among other things:

> "In the opinion rendered in *United States* v. *Wilson* (7 Pet. 150, 159) Marshall, J., uses the following language: 'A pardon is an act of grace proceeding from the power intrusted with the execution of the laws which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.' * * * [p. 107].
>
> **The effect of a pardon of a convict is not to annul a judgment of conviction obtained against him, nor to determine that such judgment was erroneous or unjust"** [p. 108].

After quoting from the opinion of this Court in *Knote* v. *United States* (*supra*) it continued:

> The pardon granted to the plaintiff *did not* have the retroactive effect of determining *that the judgment or conviction was erroneous or unjust,* or that his imprisonment thereunder was unlawful [p. 109].

The Court of Appeals, in affirming the decision of the Appellate Division, practically adopted its opinion, [160 N. Y. 217, 221] and further stated:

> "It is manifest that the appellant's pardon and restoration to the rights of citizenship had **no retroactive effect upon the judgment of conviction which remains unreversed and has not been set aside.** We think the effect of a pardon is to relieve the offender of all unenforced penalties *annexed to the conviction,* but what the party convicted has already endured or paid, the pardon does not restore. When it takes effect, it puts an end to any further infliction of punishment, but has no operation upon the portion of the sentence already executed. **A pardon proceeds not upon the theory of innocence, but implies guilt.** If there was no guilt, theoretically at least, there would be no basis for pardon. It is granted not as a matter of right, but of grace. In the language of another: 'A party is acquitted on the ground of innocence; he is pardoned through favor.' The pardon in this case shows upon its face that it was granted as an act of mercy, and not as one of justice. It was upon the representation that the appellant was a fit subject for mercy that it was obtained, and not upon the ground that the judgment was unjust or invalid. **If the judgment was erroneous, the remedy was by appeal or by application to set it aside, and not by pardon. That question was for the judicial branch of the state government to**

determine, and not for the legislative or executive department" [160 N. Y. 221-222].

In the *Matter of* , *An Attorney,* (86 N. Y., 563), the subject is discussed at some length and the authorities collated, and it is pointed out that a pardon remits the offense, and the penalties, forfeitures or sentences "growing out of it" [p. 569] but it "cannot wipe out the act that he did, which was *adjudged* an offense. It was done and will remain a fact for all time." [p. 569].

In *Baum* v. *Clause* (5 Hill, 196) the Court said *per* BRONSON, J.:

> **"It has been said that a pardon takes away the guilt, as well as the punishment of the offense** (*Cuddington* v. *Wilkins, Hob. R. 67, 81; Stark on Sland., 180*) **but this is neither sound law nor good morals.** Pardon removes the legal infamy of the crime, so that the offender will be a competent witness; but it cannot take away guilt or wash out the moral stain. Pardon does not even restore the competency of the offender as a witness, where the conviction is for perjury (2 R. S. 681, §1), and although in other cases competency is restored by the pardon, the crime still goes to the credit of the witness (1 *Phil. Ev.* 35; 1 *Stark Ev.* 100, Ed. of '42)."

That was an action for slander, and it was held by the court that to say to a person "You was guilty of, or did commit the offence," would be just as true after as before, the pardon; that, "*the pardon has taken away the penalty annexed to the crime; but it has not destroyed the fact that the crime was committed*" [p. 199]. BRONSON, J., further said: "Pardon takes away the penalty *directly* annexed to the offense; but it does very

little towards removing the other consequences which result from the crime." [p. 197].

A number of authorities are there collated, showing that although the penalty for the offence may be removed, the fault will still remain, and that the effect of a pardon is merely to make the offender a new man and not to restore his former, but to give him a new credit and capacity.

In *Eighmy* v. *People* (78 N. Y., 330, 333), the Court in holding that the granting of a pardon did not constitute any ground for dismissing, on motion of the People, a writ of error to review a conviction said:

> "The pardon issued because he was deemed a fit object of mercy, and in consequence of it the sentence is not enforced; but from the judgment until reversed injury may be presumed. The defendant may not be punished according to its terms, but the infamy and discredit to which by it he is subjected will remain." [p. 333].

In *Cook* v. *Middlesex County,* (26 N. J. L., 326, 333 affd. 27 N. J. L., 637), the Court said that a pardon was:

> "An exercise of sovereign or executive clemency *toward the guilty* * * * a suspension of the just sentence of the law, induced by the facts and circumstances of the crime or by the character and condition of the criminal."

It is there further stated:

> "Pardon implies guilt. If there be no guilt there is no ground for forgiveness. It is an appeal to executive clemency. It is asked as a matter of favor to the guilty. It is granted not of right but of grace. A party

is acquitted on the ground of innocence, but is pardoned through favor." [p. 331].

BLACKSTONE says (4 Com. 402) that the effect of a pardon by the king "is to make the offender a new man; to acquit him of all corporal penalties and forfeitures *annexed to that offense* for which he obtains his pardon; and not so much to restore his former, as to give him a new credit and capacity."

In an opinion by ATTORNEY GENERAL GRIGGS, it is said that if executive clemency is to be exercised, it ought *not* to appear as a finding of innocence (23 Op. Atty. General, 360). And ATTORNEY GENERAL WIRT maintained that the power of pardon neither requires nor authorizes the President to enter into an investigation of facts after a trial and conviction and an appeal and decision adverse to the accused, not set up nor proven at the trial and which if true should have been interposed to the indictment (1 Op. Atty. Gen., 359).

PROFESSOR WIGMORE points out that a pardon does not remove the admissibility of the original judgment for the purpose of the testimonial impeachment of a witness, for (unless otherwise expressly declared therein) it does not imply a finding of the innocence of the person convicted. It may remove the disability and render a person competent as a witness, but it does not change the common law principle that a conviction of an infamous offense is evidence of bad character for truth, and the conviction may be shown as affecting credibility (Wigmore on Evid. Vol. II. §980, (3) p. 1107; Curtis *v.* Cochran, 50 N. H. 242; See also Eighmy *v.* People, 78 N. Y. 330, 333).

In another Opinion rendered by Attorney General Griggs (Op. Atty.-Gen. Vol. 22, p. 36), he maintained that a pardon granted by the President, while it restored the person to whom it was granted to all the rights and privileges of a citizen which he had anterior to his conviction, and relieved him from the disabilities legally attaching to his conviction, it did not destroy the existing fact that his service as a soldier was not faithful and honest and that his application for re-enlistment in the military service might be rejected.

The Executive Authority Cannot Perform Judicial Functions.

The pardoning power, vested in the executive authority by the constitution, is logically vested in that branch of the government, because it is executive in its nature, being practically a suspension of the execution of the judgment; but it is fundamental that the executive branch of the government is not clothed with *judicial* authority, nor authorized to perform judicial functions (Cooley's Const. Lim. [7th Ed.], p. 162; 128 *et seq.*).

The conviction of an offender under our system of government and under our system of jurisprudence is **a judicial act, and a judicial act only;** and while power is vested in the executive branch of the government to relieve offenders from the consequences of their criminal conduct, under what has been called "*the benign prerogative of mercy*" (*Ex parte* Garland, *supra*) reposed in the executive authority, there is no power vested in such authority to **annul,** in the real sense of the word, a judicial act, and, hence, there is no power

to annul the fact of conviction—the judicial ascertainment of guilt—however much the executive power may be used to relieve the offender from the consequences flowing therefrom *in the domain within which the executive functions may be exercised.*

In *Roberts* v. *State of New York* (30 App. Div. 106; 160 N. Y. 217) it is pointed out that the judgment of conviction in the criminal court is *conclusive* as to the prisoner's guilt, and that neither the legislative or executive authority has any power to annul it; and the language of *Ex parte Garland* is construed to refer only to a time subsequent to the granting of the pardon, and to mean that, so far as the offense to which the pardon related is concerned, the recipient cannot be required to pay any penalty as a result thereof; but the judgment of conviction remains a fact and its validity and correctness are unimpaired.

> Roberts *v.* State, 30 App. Div. 106; 160 N. Y. 217.

One of the basic principles upon which our system of government, both State and Federal, is founded is that the judicial, legislative and executive branches thereof are each supreme in the exercise of the functions allotted to them, and that none of these branches of government can interfere with the functions of either of the others. That, we take it, is fundamental, except in so far as the power of interference is expressly conferred by constitutional provision or due legislative enactment. (Matter of Davies, 168 N. Y. 89, 101, 102; Ware *v.* Hylton, 3 Dall [U. S.] 199, 266; Am. & Eng. Ency. of Law, 2nd Ed., Vol. 6, pp.

1006, 1008; *Id.* Vol. 24, p. 557). The right of interference can never arise from implication.

In *Matter of Davies* (168 N. Y., 89), the Court, citing many authorities, said *per* Vann, J.:

> "Free government consists of three departments, each with distinct and independent powers, designed to operate as a check upon those of the other two co-ordinate branches. The legislative department makes the laws, while the executive executes, and the judiciary construes and applies them. Each department is confined to its own functions and can neither encroach upon nor be made subordinate to those of another without violating the fundamental principle of a republican form of government" [pp. 101, 102] [citing many cases].

In *Kilbourn* v. *Thompson* (103 U. S. 168, 190) the Court said:

> "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."
>
> * * * * * * * *

"In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another."

In *United States* v. *Klein* (13 Wall. [80 U. S.], 128, 147, 148) the court said:

"It is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offence pardoned and removes all *its penal consequences*. It may be granted on conditions. In these particular pardons, that no doubt might exist as to their character, restoration of property was expressly pledged, and the pardon was granted on condition that the person who availed himself of it should take and keep a prescribed oath.

"Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the courts to be instrumental to that end."

The Executive can no more usurp the functions of the Courts, and determine for himself the validity of their judgments and decrees, than the courts can interfere with a power vested in him.

BLACK in his work on constitutional law says: "It is also a limitation on the executive power that no officer of that department should be charged with duties or invested with functions which properly belong to the judiciary" [p. 91].

He states that "the distinction between pardon, amnesty and reprieve seems to be that pardon permanently discharges the individual designated from all or some specified penal consequences *of his crime*, but does not affect the legal character of the offense committed"; and that "*a pardon is granted to one who is certainly guilty*, sometimes before, but usually after conviction; amnesty is the abolition or oblivion of the offense; pardon is its forgiveness" [p. 322]. [See also Am. & Eng. Ency. of Law, Vol. 2, p. 307; Cyc., Vol. 2, pp. 284, 285.]

The Federal Constitution.

Now, it is true that the President of the United States has power to grant pardons for offenses *against the United States* (U. S. Const., Art. II, § 2) both before and after conviction (*Ex parte* Garland, 4 Wall. [71 U. S.], 333, 380), and that he may relieve the offender from all penalties and liabilities *to the sovereignty he represents*, and from all disqualifications or penal consequences which might be incurred by the offender **under its laws—arising out of the offense pardoned** (Knote *v.* United States, 95 U. S. 149, 153).

It is equally true that a pardon granted by the President, for an offense against the United States, *before* conviction, would prevent such offense from ever becoming, *under the statutes of New York*, a basis for the prosecution of a person as a second offender—for the simple reason that there would be no *conviction*, and that it is the *fact of conviction*—that is the judicial ascertainment of guilt—and not of the commission of an offense, that constitutes the predicate for such a prosecution (N. Y. Penal Law, §§ 1940, 1941). The "conviction" is *evidential* of a greater degree of criminality in the subsequent offence.

But, where a pardon is granted *after* conviction, while it may remove the disabilities and penal consequences arising from the offense and restore to the offender his civil rights, it does *not*, we submit, wipe out the *fact* of conviction—certainly not where upon its face it plainly appears that it was granted entirely as an act of grace, and proceeded on the assumption and recognition of guilt and upon the validity and correctness of the conviction —the judicial ascertainment of such guilt—and was based on the good conduct of the delinquent subsequent to his incarceration and release from imprisonment, after paying the penalty for his crime (Record, pp. 9, 28).

Ex parte Garland (4 Wall 333) considered.

The main argument of the learned counsel for the plaintiff in error is based upon some general language which he finds in some opinions of the United States Supreme Court, notably in *Ex parte Garland* (4 Wall. 333).

This language is to the effect that a pardon when full, releases the punishment and "blots out the existence of guilt," so that "in the eye of the law the offender is as innocent as if he had never committed the offense" (*Ex parte* Garland, 4 Wall. 333, 380; U. S. *v.* Padelford, 9 Wall. 531; Osborn *v.* U. S., 91 U. S. 474; People *ex rel* Forsyth *v.* Court of Sessions, 141 N. Y. 288). The court in those cases was not considering any question such as is now presented, and this general language, when considered with its context, with the subject under consideration, and in the light of subsequent decisions, must be taken to mean only that a pardon granted *after* conviction relieves the convict from penal consequences and disabilities that flow from the criminal act of which he has been convicted,—and then *only so far as it is within the power of the government under whose authority the pardon was granted to relieve him.* (Knote *v.* United States, 95 U. S. 149, 153).

A critical analysis of *Ex parte Garland* will, we submit, show that that case is an authority in our favor, rather than against us. Garland had been a practicing attorney. During the Civil War he had served under the Confederacy. After the war he received a "full pardon and amnesty for all offenses by him committed, arising from participation, direct or implied, in the said Rebellion" [p. 337]. By an Act of Congress passed in January, 1865, persons desiring to practice before the United States Courts were required to subscribe to an oath, among other things, that they had not voluntarily borne arms against the United States or given aid, etc., to her enemies, or accepted office under, or voluntarily supported

any pretended government, etc., hostile to the United States.

Garland had held office and served under the Confederacy. After receiving the pardon and amnesty, he applied for leave to practice as an attorney and counsellor, and sought to be relieved from taking the prescribed oath, submitting, in support of his request for exemption, the President's pardon.

This Court—Mr. Justice Field writing the opinion in which the *dictum* relied on by the plaintiff-in-error appears—held that Garland **could not** take the prescribed oath, *for it was not in accordance with the facts* [p. 377]—necessarily holding, therefore, that the pardon did *not* obliterate the past or destroy a preexisting fact. It relieved Garland from "all penalties and disabilities attached to the offense of treason, committed by his participation in the rebellion", and, *so far as that offense was concerned*, placed him beyond the reach of punishment of any kind [p 381]. Accordingly it was held that he need not take the oath. The pardon relieved him from any disabilities or penal consequences of the offense under the laws of the United States, but it did not alter the *fact* that he had committed treason.

There is no difference between a president's pardon and that of a governor.

The decision in the *Price* case did *not* proceed upon the theory that the State of New York was not bound to recognize the validity of the official act of the governor of Georgia—for clearly it was (U. S. Const. Art. IV, §1; Smithsonian Inst. *v.* St. John, 214 U. S. 19, 28; C. & A. R. R. Co. *v.*

Wiggins Ferry Co., 119 U. S. 615, 622; Town of South Ottawa *v.* Perkins, 94 U. S. 260, 268)—but upon the theory that the pardon granted by the governor of Georgia, while it relieved the offender from all the consequences of his crime *there committed*, it "*did not disprove the fact of conviction*," and did not affect the validity of the legislation of the State of New York under which the fact of the previous conviction, judicially ascertained, was made part of the offense against the law of New York thereafter committed, in the sense that it increased "the grade of the prisoner's guilt" (People *v.* Sickles, 156 N. Y. 541, 547) and hence made the offender subject, under its laws, to an increased punishment *for the offense against the laws of New York thereafter committed*.

There is no difference, we submit, in this respect between the effect of a pardon granted by the governor of a State for an offense against its laws, and a pardon granted by the President of the United States for an offense against the Federal law [*vid* cases *ante* p. 43 *et seq.*].

In *People* v. *Bowen* (43 Cal. 439, 13 Am. Rep. 148), it was held that the power of the executive authority of the state to pardon offenses, conferred upon him by the constitution was "of the same general nature as that conferred upon the President of the United States by the Federal Constitution" and that, while it was true that the pardoning power of the President extended to the pardon of offenses before as well as after conviction, while that of the governor, under the provisions of the state constitution, embraced only those cases in which a conviction had already been had, and while it was also true that the pardoning power of the governor was subject to such

regulations as the legislature might provide in relation to the manner of applying for a pardon, nevertheless, "*the inherent nature and operation of the power itself, whether exercised by the one or the other of these officers, and the consequences of its exercise by either in a given case, must be considered to be substantially identical* * * *." The court further stated that the pardoning power, whether exercised under the federal or state constitution, is the same in its nature and effect as that exercised by the representatives of the English Crown in this country in colonial times.

In *Ex Parte Powell* (73 Ala., 517, 49 Am. Rep., 71), the Court said:

> "The pardoning power as exercised under our form of government, both federal and state, is, no doubt, essentially the same in its nature and effect as that exercised by the representatives of the British Crown, in the parent country, whence we derive our system of common-law jurisprudence. A pardon, alike under both systems of government, has always been considered a mere act of grace or governmental forgiveness of the offense, by which the penalty of crime is legally remitted."

To the same effect see *Hunnicutt* v. *State* (18 Tex. App. 498, 517); Am. & Eng. Ency. of Law, 2nd Ed., Vol. 24, p. 565, and cases there cited; *Id.* Vol. 6, p. 1010; Black's Const. Law, pp. 121, 122; *Ex parte* Wells, 18 How. (U. S.) 307; United States *v.* Wilson, 7 Pet. 150.

The effect of the decisions to which the appellant has referred is merely that the Congress of the United States could not impair the force of

the pardon, which, under the Federal Constitution, the President grants, and we may assume that no State could impair its force or its validity, but that does not answer our contention. *There is nothing in the Federal Constitution which prohibits the State of New York from making the fact of a previous conviction, wherever had, an ingredient of criminality, or treating it as indicative of a greater degree of guilt, in a subsequently committed offense against its laws, whether the offender had been pardoned or not.*

The Sovereign Power of the State. Its power to punish offenses and to declare what shall be evidence and the effect thereof in its own Courts.

1. It is true that the Federal Constitution and the laws passed in pursuance thereof are the supreme law of the land, which means that the Federal government being a government of delegated powers, surrendered to it by the People of the States, has the exclusive right to act within the domain of those powers, and that no State can pass a law, or exercise an authority, that comes in conflict with the Constitution or Federal action or legislation taken or passed in pursuance thereof.

The limitations imposed by the Federal Constitution are limitations on the powers of the *Federal Government only,* except in so far as it contains express limitations on the powers of the states.

Barron *v.* Baltimore, 7 Pet. 243, 250.
Fox *v.* Ohio, 5 How. 410.
Smith *v.* Maryland, 18 How. 71, 76.
Livingston *v.* Moore, 7 Pet. 469.

United States *v.* Cruikshank, 92 U. S. 542.
Presser *v.* Illinois, 116 U S. 252, 265.
Spies *v.* Illinois, 123 U. S. 131.
Cooley Const. Lim. 7th ed. p. 46.

Within the sphere of the enumerated powers which have been granted by the Constitution to the Federal government that government is, of course, supreme, and no State can pass or enforce a law which, by its necessary effect and operation, usurps a power granted by the Constitution to the government of the United States. In such case, where a state law comes in conflict with a function vested exclusively in the Federal government, under which the Federal government had acted, the state law must yield (McCray *v.* U. S., 195 U. S., 27, 60). But the conflict must be manifest and the State law inconsistent with the Federal law to render it invalid.

But except in so far as the people of the States have surrendered powers to the general government, the power of the State is supreme. It is subject to no limitation, except those *expressly* placed upon it by its own or the Federal Constitution.

Ware *v.* Hylton, 3 Dall. 199, 224.
Rhode Island *v.* Mass. 12 Pet. 657, 720.
Martin *v.* Hunter, 1 Wheat 304, 325.
Calder *v.* Bull, 3 Dall. 386, 387.
Chisholm *v.* Georgia, 2 Dall. 419, 435.
Comm. of Mass. *v.* Klaus, 145 App. Div. 798, 802.

In *Chisholm* v. *Georgia* (2 Dall. 419, 435), the Court said:

"The United States are sovereign as to all

the powers of government actually surrendered; each state in the Union is sovereign as to all the powers reserved."

2. The POLICE POWER of the State, which extends to all the great public needs (Noble St. Bank *v.* Haskell, 219 U. S. 104, 111) reserved by the States, includes within its scope the right to declare what shall be a proper punishment for offenses against its laws, and its action in that respect is not subject to Federal interference.

McDonald *v.* Comm., 173 Mass., 322, 328; aff'd as McDonald *v.* Mass., 180 U. S. 311.

Comm. *v.* Murphy, 165 Mass., 66.

In re Kemmler, 136 U. S., 436.

People *v.* Sickles, 156 N. Y. 541.

People *v.* Price, 53 Hun 185; 119 N. Y. 650.

Barker *v.* People, 3 Cow. [N. Y.], 686, 704.

In *Barker* v. *People* (*supra*), the Court said:

"The power of the legislature in the punishment of crimes, is not a special grant, or a limited authority to do any particular thing, or to act in any particular manner. It is a part of 'the legislative power of this state', mentioned in the first sentence of the constitution. It is the sovereign power of a state, to maintain social order, by laws for the due punishment of crimes. * * * The legislature have power to prescribe imprisonment or death, as the punishment of any offense. The rights of a citizen, are thus subject to the power of the state, in the punishment of crimes; and the restrictions of the constitution upon this, as upon all the general powers of the government, are that no citizen shall be deprived of his rights, un-

> less by the law of the land or the judgment of his peers, and that no person shall be deprived of life, liberty or property without due process of law. * * *
>
> The power of the state over crimes, is thus committed to the legislature, without a definition of any crime, without a description of any punishment to be adopted, or to be rejected, and without any direction to the legislature concerning punishments. It is then a power to produce the end by adequate means; a power to establish a criminal code, with competent sanctions; a power to define crimes and prescribe punishments by laws, in the discretion of the legislature." [pp. 704, 705.]

To the same effect see *Coffey* v. *Harlan County*, 204 U. S. 659, 662, 663.

In *McDonald* v. *Comm.* (173 Mass. 322), the Court said: "It is for the Legislature to determine what acts shall be regarded as criminal and how they shall be punished" [p. 328], and this Court in affirming the judgment said: "It is within the discretion of the legislature of the State to treat former imprisonment in another State as having the like effect as imprisonment in Massachusetts, to show that the man is an habitual criminal" [180 U. S. 313]. (See also People *v.* Sickles, 156 N. Y. 541, 548.)

Applying these principles to the case at bar, it is apparent that the State in declaring that a person who has been previously *convicted* of crime shall be liable to a heavier punishment for a subsequent offense against its laws, is not usurping any function or exercising an authority beyond its *power*. The state is not undertaking to punish the defendant for his offense against the Federal law. The punishment for that offense

was exclusively within the power of the Federal Government; and it was also within the power of the Federal government, acting through its executive, under the powers conferred upon him by the constitution, to remit the debt which he owed to the Federal government by reason of his offense, and to release him from the disabilities imposed by *its laws*.

3. But, as we have previously pointed out, the remission of that debt and the release from all disabilities imposed by the Federal laws by reason of his conviction did not nullify the fact that he was convicted—that his guilt of the offense had been determined.

The state may regard that fact as evidential of a greater degree of criminality when the defendant subsequently violates its laws and commits a crime against its sovereignty. And that is what it does.

It has been frequently laid down that it is within the acknowledged power of every legislature to declare what shall be evidence and the effect of that evidence in the courts of its own government. The only limitation is that there must be some fair and logical relationship between the *factum probans* and the *factum probandum* of which it is declared to be evidential.

Adams *v.* New York, 192 U. S. 585, 599;
Fong Yue Ting *v.* United States, 149 U. S. 698, 729 [and cases there cited].
Odgen *v.* Saunders, 12 Wheat., 213, 262, 349.
Bailey *v.* Alabama, 219 U. S. 219, 238.
People *v.* Cannon, 139 N. Y. 32.

In *Bailey* v. *Alabama* (*supra*) this Court said:

> "This Court has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own government" [p. 238].

It is always open to a defendant to show that he was not the person who was previously convicted, so that he may meet the main fact produced against him. There is no denial of due process. (People *v.* Sickles, 156 N. Y., 541; Coffey *v.* Harlan County, 204 U. S. 659, 663; Bailey *v.* Alabama, 219 U. S. 219, 238; Graham *v.* West Virginia, 224 U. S. 616).

4. The situation here is analogous to that in the *Hawker* case (Hawker *v.* New York, 170 U. S. 189). There the defendant had been convicted of a felony. Subsequently a law was enacted prohibiting any person who had been convicted of a felony from practicing medicine. He was convicted of a violation of that law and claimed that it was *ex post facto* as to him. The Court held that the prohibition to practice medicine was not to be regarded as an additional punishment for the previous felony, but that the statute should be regarded as though it declared that one who had violated the criminal laws should be deemed of such bad character as to be unfit to practice medicine, and that the *record of conviction* should be *conclusive evidence* of such violation, further saying:

> "It is not open to doubt that the commission of crime, the violation of the penal laws of a State, has some relation to the question of character. It is not, as a rule, the good

> people who commit crime. When the legislature declares that whoever has violated the criminal laws of the State shall be deemed lacking in good moral character it is not laying down an arbitrary or fanciful rule—one having no relation to the subject-matter, but is only appealing to a well-recognized fact of human experience; and if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the State? The conviction is, as between the State and the defendant an adjudication of the fact. So if the legislature enacts that one who has been convicted of crime shall no longer engage in the practice of medicine, it is simply applying the doctrine of *res adjudicata* and invoking the conclusive adjudication of the fact that the man has violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care."
>
> Hawker *v.* New York, 170 U. S. 189, 196.

So, in this case, the previous conviction—*when alleged and proved and found by the jury*—is conclusive evidence of the greater criminalty of the defendant in committing the subsequent crime. And the pardon does not, we submit, in any way affect it.

In *People* v. *Sickles* (156 N. Y., 541), the Court said *per* GRAY, J.:

> "The legislature has plenary power to make laws for the community, in its social and aggregate capacity, within limits set by the Constitution. It is its duty, and it has the amplest power, to prescribe the punish-

ments for offenses against the laws of the state and there is no arbiter beyond the state itself to determine what legislation is just. Punishment is inflicted; because it is right that the state, in the interests of society, of which it is the organized expression, should prescribe it as a measure for the prevention of crime. In so doing, it is right that the degree of punishment should be measured by the criminality of the individual and that such an example shall be made as will tend to establish a deterrent influence over the members of society. Reason suggests that the persistent and hardened offender needs a severer punishment. The previous punishment having failed to reform him, his guilt, upon his further offending, is greater, and, being so, severer treatment is needed, to compel him to reform his ways, and in furtherance of the effort to prevent crime. In enacting that, upon a conviction for a second offense, the punishment shall be one of greater severity, the legislature has acted in accordance with the dictates of a wise policy and has invaded no constitutional right.

How can it be said that the defendant has not had due process of law? The statute announced the enhanced penalty, which he would incur by repeating his infraction of the laws against crime. The indictment charged him with the aggravated crime and he was put upon his trial, under the charge of being for a second time an offender, and, therefore, liable to suffer a severer punishment. His sentence was pronounced, after he had been tried and found guilty by the verdict of a jury. The course of the administration of justice was regular in all respects'' [p. 548].

A Pardon by the President Does Not Remove Disabilities Imposed by State Laws.

BISHOP in his work on Criminal Law, Vol 1, §920, says:

> "A pardon by the President of the United States does not remove disabilities imposed by state laws."

BLACK in his work on Constitutional Law, p. 327, says:

> "A pardon granted by the president restores the convict to the rights and privileges of a citizen of the United States; but it does not, without the assent of the state, where the sovereign power had excluded him from political rights, restore him to the exercise of those rights."

In *Ex parte Hunter, et al.*, (2 W. Va. 122), a number of applicants sought admission to the Bar of the State of West Virginia. As a condition precedent to admission to practice, it was required that the applicant take an oath declaring that he had not "since the 20th day of June, 1863, borne arms against the United States or against the State of West Virginia." The applicants had fought in the Civil War on the side of the Confederacy. At the conclusion of the war all of the applicants had been pardoned "upon the terms prescribed in the amnesty proclamation of President Johnson." The Court of Appeals of West Virignia held that a pardon by the President of the United States did not operate so as to entitle the applicants to be admitted to the practice of law. In the course of his opinion, the President of the Court said:

"And while the President's pardon might restore the party to all the rights and privileges which he held or derived under the government which conferred the pardon, it would hardly, I imagine, be seriously contended that the effect of such a pardon could be extended further; but would leave the party to make his peace with his offended State as best he could; and in no event could such a pardon restore him to forfeited privileges which had been originally conferred by, or derived from the State Government, and which, if enjoyed or exercised at all, must be done under the State laws." [p. 143].

And Loomis, J., in the course of his concurring opinion, said:

"The application of those parties who introduce in evidence, a certificate of special pardon, granted by the President of the United States, and reciting that it was granted for the remission of Treason against the United States, by complicity in the late rebellion, presents a state of facts which compels me to the following conclusions, namely: the pardoning power of the President is confined to offences against the United States, as he represents that government alone. Nor does he attempt to go beyond this limit. The legislature of this State has not been blind to the *fact*, *extent* and *aim* of the rebellion; its purpose was to destroy the Union, and subvert the government of this State. Whether the crime of the rebellion was compound Treason against the general government and each of the State governments is a question not necessarily to be here determined.

"The certificate so produced is an admission that the party was guilty of the offences pardoned. These parties stand, therefore, as exempted from the penalties of Treason

by them committed against the United States; and it is not necessary to say whether they are still amenable to *this State* for the *same act* so far as it was an offence against the laws of this State—because neither the oath in question, nor the consequent deprivation resulting to the party who is unable to take it, is in the nature of a *penalty* for any offence, whether pardoned or unpardoned, therefore the question is not affected by conceding that they are exempt from the *penalties* in *both* cases. Although pardon of the Executive may work a "complete oblivion of the past," so that the crime pardoned, by fiction of law, *has no legal existence*, yet it is *historically* true, nevertheless, and the parties stand by their moral turpitude of the crime. They have not the "honest demeanor," required by the Code. (Sec. 1, chap. 164.)" [pp. 184-185].

In *Ridley v. Sherbrook*, (43 Tenn., 569), the Court said:

"The relator was pardoned by the President of the United States, the effect of which was to restore him to the rights and privileges of a citizen of the United States; but it did not have the effect, without the assent of the State, where the sovereign power had excluded him from political rights, to restore him to the exercise of those rights." [p. 576].

In Vol. 8, p. 284, Opinions of Attorneys General, CUSHING, ATTORNEY GENERAL, said:

"As to the matter of incidental disabilities a conviction for crime, it has seemed to me that a pardon by the proper pardoning power of one jurisdiction does not affect disabilities imposed by another jurisdiction."

The same Attorney General, in another Opinion rendered by him (Op. Atty.-Gen., Vol. 7, p. 760) maintained that the President of the United States has no power by a supplemental or special pardon to relieve a Federal convict of legal or political disabilities imposed on such convict by the laws of one of the States.

That Opinion was rendered with respect to a disability by which a person convicted of an infamous crime was prohibited from voting in New York. The learned Attorney General said that if it were a special disability imposed by the laws of New York, and not by any Act of Congress, it could be removed only by the authority of that State, and was altogether beyond the reach of the President of the United States, and that the question of the construction of the laws of the State of New York was a question the solution of which belonged to the jurists of that State.

The fallacy underlying the argument of the plaintiff-in-error is that he loses sight of the fact that the increased punishment is in no sense inflicted as a punishment for the former offence. The State of New York has a right to classify persons for the purpose of punishment for offenses committed against itself, and, as a basis for such classification, it has determined that the moral turpitude of those whose guilt of previous crimes has been ascertained by the universally recognized process of the law is greater than that of those who have never before been convicted, and its legislation in that respect violates no constitutional provision (McDonald *v.* Mass., 180 U. S. 311, 313; Graham *v.* West Virginia, 224 U. S. 616).

The Dictum of Mr. Justice Hughes in Graham v. West Virginia, 224 U. S. 616, considered.

We have already referred to and quoted from the case of *Graham* v. *West Virginia* (224 U. S. 616), but there remains to be considered a *dictum* of Mr. Justice Hughes contained in the opinion. The question involved in that case was the validity of the statutes of West Virginia which permitted the fact of a prior conviction to be ascertained in a separate proceeding instituted by information, the claim of the prisoner being that such procedure was a denial of due process. In the course of his opinion, MR. JUSTICE HUGHES used the following language:

> "Plainly, the statute contemplated a valid conviction which had not been set aside or the consequences of which had not been removed by absolute pardon." [p. 625].

1. No question of a pardon or its effect upon a conviction was involved in that case, and the remarks must therefore, we respectfully submit, be regarded as *obiter*. Moreover, we submit it is for the Courts of the State to determine the scope and purview of its statutes (Ross *v.* Oregon, 227 U. S. 150, 161, 162; Clement Nat. Bank *v.* Vermont, 231 U. S. 120, 134; Stone *v.* So. Ill. Bridge Co., 206 U. S. 267, 272).

2. A reversal or setting aside of a conviction operates retroactively and completely annuls it. A pardon, on the other hand, we submit, has no retroactive effect upon the conviction or judgment and does *not* annul it. While it undoubtedly relieves the convict from the penal consequences of the offence pardoned and prevents him from being subjected to any further punishment by rea-

son of the conviction, it does not, we submit, destroy the fact of conviction or affect its lawfulness, and does not prevent a State, in the exercise of its inherent power, from regarding the fact of conviction as a fact in aggravation of guilt, when a person who has been previously convicted commits an offense against its laws. It must be borne in mind that the increased punishment, as is pointed out in the *Graham* case, is solely for the later criminal act, the criminality of which is deemed to be greater and deserving of greater punishment when committed by a person who had been previously convicted and thereby received a solemn warning that if he committed crime in the future he would be severely dealt with.

Another matter suggests itself in this connection. In the foregoing part of this brief we have discussed the question generally and without reference to the particular form of the pardon in this case.

The pardon in this case shows upon its face that the prisoner had "*pleaded guilty*" to the offence in the Federal Court, that he was sentenced to imprisonment for three and a half years, that he served his term of imprisonment, and that it was granted upwards of five years after release from imprisonment, and in consideration of his good conduct while in the prison and subsequent to his release, and that the purpose of granting it was merely "to restore his civil rights." The President, therefore, in granting the pardon, assumed and recognized the guilt of the recipient thereof and the legality and correctness of the judgment which had been rendered against him. Whether any different rule

should apply in a case where a pardon was granted because of the supposed innocence of the convict would seem to be a question of policy,—and, hence for the lawmaking body to decide—and it must be left to the State to determine, when the question arises, whether it will apply a different rule, depending upon the particular theory upon which the pardon was or purports to have been granted. [See, for example, Mass. Laws, 1887, Chap. 435, §1, which provides for increased punishment for second offenders, and which contains an express *proviso* "if the person so convicted shall show to the satisfaction of the Court before which such conviction was had that he was released from imprisonment upon either of said sentences upon a pardon granted on the ground *that he was innocent*, such conviction and sentence shall not be considered as such under this act (McDonald *v.* Mass. 180 U. S., 311)].

We submit that there is no difference whether the pardon purported to be granted on the theory of guilt or on the theory of innocence. The determination of the guilt or innocence of the convict was a matter for the courts to decide and not for the executive authority. If it should be made to appear that the convict who was subjected to an increased punishment for the later crime had not been guilty of the former, it might afford a ground for the executive authority of the State, in whom is vested the pardoning power, to pardon the offender or commute his sentence—if the interests of justice so required; but that, we submit, is a problem for the States to solve for themselves. The law cannot be changed to meet hard cases, and every general law is likely to work harshly in particular instances, but it is not for that reason invalid (Shevlin-Carpenter *v.* Min-

nesota, 218 U. S. 57, 70; People *v.* Luhrs, 195 N. Y. 377, 384; People *v.* Girard, 145 N. Y. 105, 110). Injustice can always be redressed by some proper mode.

In Conclusion.

We submit that, for the reasons aforesaid, no Federal question is presented for review by this Court; and that, on the merits, the judgment and rulings of the State Courts are correct; that, by the judgment rendered, no provision of the Federal Constitution was violated, nor any right, privilege or immunity accruing to the plaintiff-in-error under the Constitution or laws of the United States, denied; and that the statute of New York, construed to include within its scope a prior conviction for a Federal offense, of which the convict had been pardoned, is a valid enactment, within the *power* of the State, and that, therefore,

The writ of error should be dismissed or the judgment should be affirmed.

Respectfully submitted,

CHARLES S. WHITMAN,
District Attorney,
New York County.

ROBERT S. JOHNSTONE,
Assistant District Attorney,

STANLEY L. RICHTER,
Deputy Assistant District Attorney,
Of Counsel.

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